Procter R. Hug, Jr.

Interviewee: Procter R. Hug, Jr.
Interviewed: 1995-1996; 2008
Published: 2013
Interviewer: Brad Williams
UNOHP Catalog #229

Description

Procter Ralph Hug Jr., Senior U.S. Circuit Judge for the U.S. Court of Appeals for the Ninth Circuit, was born March 11, 1931, in Reno, Nevada. He has made a lasting mark on Nevada's institutional, legal, and judicial history. His memory of early influences is a harbinger of his success as a high school debate champion. Judge Hug excelled in sports, academics, and civic activities at Sparks High School, and the University of Nevada, Reno (UNR), where he followed in his father's footsteps as Student Body President.

After serving as a lieutenant in the U.S. Navy (1954-55), and marrying Barbara Van Meter, Hug graduated from Stanford Law School (1958). He returned to Nevada to practice law in Reno's then-small legal community. A "Kennedy" Democrat, Judge Hug involved himself in civic and political life, including several elected terms as a member of the Nevada Board of Regents.

In 1977, President Jimmy Carter nominated Judge Hug to the U.S. Court of Appeals for the Ninth Circuit. The story of his selection is a lesson in Nevada judicial political history. Judge Hug has been an "agent of change." His accomplishments include drafting the framework for Nevada's present-day Gaming Control Act, and, as a Nevada Regent, working to establish the University of Nevada, Las Vegas, the UNR School of Medicine, and the National Judicial College.

Judge Hug recalls significant cases and opinions, his role models, and his judicial philosophy. In 1996, he was elevated to chief judge of the court, a post he held until 2000. His thoughts on being chief judge of a large federal circuit court reveal a close-up view of an able administrator and a vigilant guardian of the court.

The oral history interviews with the Honorable Procter Ralph Hug Jr. were part of the Nevada Legal Oral History Project, a joint effort of the Nevada Judicial Historical Society, the Ninth Judicial Circuit Historical Society, and the University of Nevada Oral History Program.

Procter R. Hug, Jr.

Procter R. Hug, Jr.

An Oral History Conducted by Brad Williams
Edited by Patricia A. Cooper-Smith

University of Nevada Oral History Program

Publication Staff:
Director: Alicia Barber
Production Assistant: Karen Frazier

Contents

Preface

Established in 1964, the University of Nevada Oral History Program (UNOHP) explores the remembered past through rigorous oral history interviewing, creating a record for present and future researchers. The program's collection of primary source oral histories is an important body of information about significant events, people, places, and activities in twentieth and twenty-first century Nevada and the West.

The UNOHP wishes to make the information in its oral histories accessible to a broad range of patrons. To achieve this goal, its transcripts must speak with an intelligible voice. However, no type font contains symbols for physical gestures and vocal modulations which are integral parts of verbal communication. When human speech is represented in print, stripped of these signals, the result can be a morass of seemingly tangled syntax and incomplete sentences—totally verbatim transcripts sometimes verge on incoherence. Therefore, this transcript has been lightly edited.

While taking great pains not to alter meaning in any way, the editor may have removed false starts, redundancies, and the "uhs," "ahs," and other noises with which speech is often liberally sprinkled; compressed some passages which, in unaltered form, misrepresent the chronicler's meaning; and relocated some material to place information in its intended context. Laughter is represented with [laughter] at the end of a sentence in which it occurs, and ellipses are used to indicate that a statement has been interrupted or is incomplete…or that there is a pause for dramatic effect.

As with all of our oral histories, while we can vouch for the authenticity of the interviews in the UNOHP collection, we advise readers to keep in mind that these are remembered pasts, and we do not claim that the recollections are entirely free of error. We can state, however, that the transcripts accurately reflect the oral history recordings on which they were based. Accordingly, each transcript should be approached with the

same prudence that the intelligent reader exercises when consulting government records, newspaper accounts, diaries, and other sources of historical information. All statements made here constitute the remembrance or opinions of the individuals who were interviewed, and not the opinions of the UNOHP.

For more information on the UNOHP or any of its publications, please contact the University of Nevada Oral History Program at Mail Stop 0324, University of Nevada, Reno, NV, 89557-0324 or by calling 775/784-6932.

Introduction

Procter R. Hug Jr., a native Nevadan, has made a lasting mark on Nevada's institutional, legal, and judicial history. Born March 11, 1931, in Reno, he describes an "ideal childhood," with parents who nurtured and encouraged a bright, busy, and optimistic child. Judge Hug's memory of early teachers is an early harbinger of his success as a high school debate champion—fertile ground for the future lawyer and judge. He represented Sparks High School at Boys State and Boys Nation, meeting President Truman in Washington, D.C. He excelled in sports and civic activities in high school and college at the University of Nevada, Reno (UNR). At UNR, he followed in his father's footsteps as Student Body President, graduating in 1953. Throughout Judge Hug's retelling of his early life, he is humble and appreciative of his advantages and opportunities.

After service as a lieutenant in the U.S. Navy (1954-55) and marrying his high school sweetheart, Barbara Van Meter, he enrolled at Stanford Law School (1958), where he was on the law review. Hug took an opportunity to take the Nevada bar examination early, passed, and returned for his last part of law school a "celebrity among the law students" who still had a bar exam ahead of them.

Judge Hug is a good storyteller of law practice circa 1959 and through the 1960s, the period after he returned to Reno to practice law. His stories of Reno's then-small legal community, divorce work, and learning how to use demonstrative evidence such as a skeleton in a box to prove his case, are informative and often humorous. Judge Hug involved himself in civic and political life as his law practice and young family grew. He was active in the state's "Young Democrats" and enjoyed taking on "the old guard."

It is a clarifying moment when his interviewer observes that Judge Hug, in his life and career, appears to be an "agent of change." Judge Hug's accomplishments include drafting the framework for Nevada's present-day Gaming Control Act, and, as a Nevada Regent, working to establish the

University of Nevada Las Vegas, the UNR School of Medicine, and the National Judicial College. His engagement in establishing these now-mainstream Nevada institutions is related with the quiet pride of an honorable man.

In 1977, President Jimmy Carter nominated Judge Hug to a seat on the United States Court of Appeals for the Ninth Circuit. His recollection of his selection is a lesson in Nevada judicial political history. His confirmation by the United States Senate was seamless. In the process he realized that he had "always wanted to be a judge."

Judge Hug recalls his early days and cases as a circuit judge, the always-heavy caseload, his role models, and his judicial philosophy. He sees himself as a centrist, and tries "to look at what happened to the individual" asking himself, "What is the story?" He sees judicial activism as "in the eye of the beholder," and the U.S. Constitution as a "living document" that is "evolving." Ever present in his mind were the serious attempts by Congress to split the Ninth Circuit. A strong advocate of keeping the Ninth Circuit intact, Judge Hug is a defender of the court as an innovative body that has worked hard to resolve problems with always too few judges and overly large caseloads.

In 1996, Judge Hug was elevated to Chief Judge of the Ninth Circuit, a post he held until 2000. His oral history is a close view of an able administrator and a vigilant guardian of the court. His goals are clear: to keep the circuit together; to fill judicial vacancies; to streamline court efficiency; and to serve the federal district court, bankruptcy, and magistrate judges in the circuit. Judge Hug reviews significant cases and opinions in a thirty-one year judicial career, which is ongoing as of this writing, with an acute memory for detail. A reader can readily see the hand of a judge skilled in the art of persuasion.

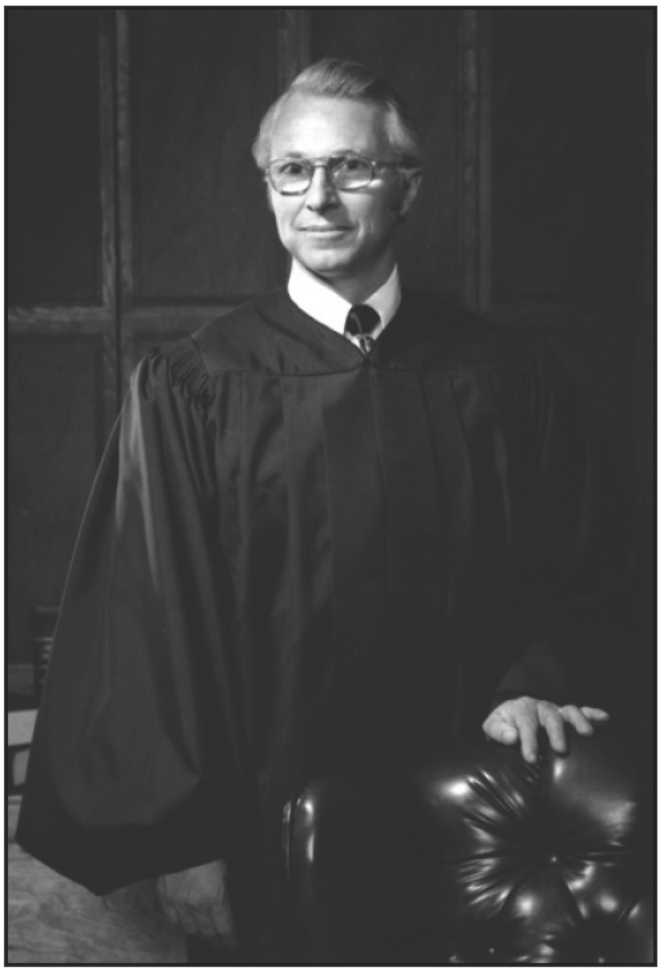
At the close of his oral history, Judge Hug acknowledges the importance of his family: his wife, Barbara, a partner throughout every facet of his career; his children—a doctor, lawyer, and teacher; and his grandchildren.

Brad Williams conducted oral history interviews with the Honorable Procter Ralph Hug Jr. in 1995 and 1996, with additional interviews in May 2008, in his chambers in Pasadena, California, and in Reno, Nevada. These interviews were conducted as part of the Nevada Legal Oral History Project, a joint effort of the Ninth Judicial Circuit Historical Society (NJCHS), the Nevada Judicial Historical Society (NJHS), and the UNOHP. Begun in 2001, the project was intended to record the life stories of leading members of Nevada's legal profession and to educate the public about law and the courts by making those stories widely available through various media.

Members of the boards of NJHS and NJCHS compiled and vetted lists of potential narrators, ultimately selecting representatives from both the state and federal benches and bars. The UNOHP, under the direction of Tom King and his successor Mary Larson, recommended interviewers, most of whom were professional oral historians, and donated equipment and transcription services. Brad Williams, of NJCHS, coordinated the project from its inception. Susan Southwick, of NJHS, oversaw that group's participation. Patricia Cooper-Smith completed the copyediting and introductions. Alicia Barber, Director of the UNOHP since 2009, supervised the project's final publication and dissemination. The project was made possible by a generous challenge grant from the John Ben Snow

Memorial Trust, with matching funds provided by the U.S. District Court for Nevada Attorney Admissions Fund, the Washoe County Courthouse Preservation Fund, and the Nevada State Bar. Thanks go to Susan Southwick and the Board of Trustees of NJHS, and to Brad Williams, who interviewed Judge Hug.

Patricia A. Cooper-Smith
Carson City, Nevada
April 2013



Hon. Procter R. Hug, upon appointment
as a U. S. Circuit Judge, U. S. Court of Appeals
for the Ninth Circuit, 1977.

Hon. Procter R. Hug, upon elevation to
Chief Judge, U. S. Court of Appeals
for the Ninth Circuit, 1996.

(Photographs courtesy of Procter R. Hug)

1

Childhood, Youth and Family

Brad Williams. This is Brad Williams. Today is December 14, 1995. I'm sitting in the U.S. Court of Appeals Building in Pasadena, and I'm here to interview Judge Procter Hug Jr. Your Honor, for the record, would you state your name?

Procter R. Hug, Jr.: Yes. Procter Ralph Hug, Jr.

Thank you. And maybe you could just tell us where and when you were born.

I was born on March 11, 1931, in St. Mary's Hospital, in Reno, Nevada.

Obviously you don't remember the circumstances [laughter], but maybe you can tell me a little bit about your parents.

Sure. My father was born in Oregon but as a teenager, I think he was probably about thirteen or fourteen, he moved to Tonopah, Nevada, with his mother and her second husband, Mr. Kind, and went to high school in Tonopah, Nevada. He was an outstanding athlete there, and then he went to the University of Nevada, where he was also a very outstanding athlete, particularly football. He then was elected student body president of the University of Nevada and he became a coach. He coached at Sparks High School and later became principal of the high school and superintendent of the schools in Sparks, Nevada, and then ultimately Superintendent of Schools for Washoe County.

My mother was born in Kansas but moved to Ely, Nevada, when she was about two years old and went to high school there and also went to the University of Nevada, where they met. I remember my dad saying that she was the prettiest girl he'd ever seen when he saw her coming down the stairs for their first date. She taught for a year and they were married right after that and lived in Sparks, Nevada. She was a big help to him always in dozens of ways, but one of them, for example, would be in coaching. She would always keep the charts.

In basketball games, she would show all the shots, keep track of the plays and so forth, so she was always a real fine helpmate.

Did you develop your interest in sports from your father's interest?

Indeed I did. One of my earliest memories as a child was that I was the mascot for the team; I was just a little guy, probably about three or four years old and they bought me a football suit; I would be down on the bench with my dad when he was coaching and they'd always ask at the rallies for me to make a speech and I usually would say a few things at the bonfire rallies and so forth. That was very exciting and that's one of the reasons I wanted to be a very good athlete, if I could.

Do you still consider yourself an athlete?

Sure. Yes.

What kinds of things do you like to participate in?

Now or earlier?

Now.

Well, I like snow skiing, water skiing, sailing, and tennis, and those actually, are probably the sports now. I've been a little bit handicapped in the last year because I had a knee injury, but other than that those things are probably the most interesting.

As a boy growing up in Nevada, what kind of sports did you participate in?

I played football, basketball, and track. I lettered in all those sports in high school. I think my best sport was track. I was a hurdler and one of the things that always tickled me the most looking back was, in my senior year, I kind of gained a lot of speed and at the interclass meet—there are fourteen events in track—and I won seven of them.

Oh my. Is there an award for best all-around athlete or anything like that, I mean did you walk away with the trophies?

Well, not at that particular meet. I did get a little trophy for being the outstanding track athlete that year. I tied the Northern Nevada high hurdle record.

Oh that's great. Do you still like to watch track, do you still go to track meets?

Yes, oh yes, yes I do. I've gone to the Olympics twice, once in Mexico City and once in Los Angeles, and yes, I'm very interested in it. And watching all other sports. I'm a real fan of University of Nevada basketball and football games. I go to all of them I can.

Do you have brothers and sisters?

I have two sisters.

And where do you fit into the scheme of things?

I'm the oldest. One sister is three and a half years younger than I am, and the other is eight years younger.

Do you remember your grandparents?

I do. One grandparent, my mother's father, Frank Beverly, died when I was about six, but I do remember him. And then my mother's mother came to live with us, and she lived with us from that time on until, well she lived there the rest of her life really, with my folks,

but she lived there all the time when I was growing up.

That was Grandmother Beverly?

Grandmother Beverly.

What was her first name? What did you call her?

I called her Nan, but her name was Grace, Grace Beverly.

And your father's parents?

My father's parents. His mother was divorced when he was an early age, probably eight or ten, something like that. His father, then, really didn't have an awful lot to do with him. He was a nice enough fellow, but he just moved away, that's when she moved to Tonopah, and it was after the divorce, she owned and ran a hat shop. My father's father lived in another community so I didn't see him that much. She remarried Mr. J. Clarence Kind, a wonderful fellow, and a very kind person. He really was, in effect, my grandfather for all the time I knew. He was a wonderful man. Both grandparents we were quite close to. We saw a lot of them. They lived in Reno, Nevada, and we lived in Sparks. They were two separate communities at that time, about three miles apart. They've now grown together. You don't know when you've left one and gotten into the other.

What was you father's mother's first name?

Ella.

What was her maiden name? Do you know?

Procter.

Procter. Well, that leads to a natural question. How did you get your first name?

That's how I got my first name.

I see.

My father's name is Procter and that's how we get the name, from her maiden name.

It sounds like a solid, all-American name to me.

Yes, it's an unusual name for a first name.

I think it is an unusual first name. Did you take kidding as a child about that?

Not really. You would think so because it is so unusual, but it was just kind of an accepted name and all of my life I was called Proc. It was kind of an advantage because it was an unusual name so everyone remembered it.

That's good. So you were born in 1931, grew up in Sparks. What was it like growing up in Sparks?

Sparks was a small community. It was, during the time I was growing up, it was probably growing from about three thousand to five thousand. Five thousand people by about the time I graduated from high school. It was a typical, kind of a slow, very friendly small community where everyone knew each other, had lots of holiday celebrations that were big events in all of our lives, whether it was Labor Day or whether it was the established celebration they called Jack's Carnival, where all the kids would dress up in costumes in a parade, and the usual kind of small community social events. And the high school sports were a very big event in the community. I mean everyone would back

them and it was very important whether your team was winning or losing and we had an awful lot of fun that way.

Yes, it sounds like an interesting household with your mother's mother living with you, Nan, and mom and dad and two sisters. What was it like in that household?

I really had an ideal childhood. I just can't think of having a better situation where parents raised the family, and my two sisters and I got along very well during this time. It was just very good. My mother was particularly good at emphasizing all of the important events in our lives. For example, if it was Valentine's Day, if it was a birthday, these were all big events in our lives, and she would magnify our successes and minimize our failures. She was really an ideal mother. My father, too, was very interested in all of our affairs and the fact that he was a teacher made him very interested, of course, in all school events. So school events became a very important thing and with family very interested in extracurricular activities, whether it was a high school play, a sports event, a debate, or just a Valentine's party at the school.

Were you a good student?

I was. Yes.

Where did you go to elementary school?

A school called Robert Mitchell. Kind of an interesting story about that, in a way. When I was in kindergarten and the first grade, it was a very old school and there were problems with the furnace and it smoked up the school sometimes. This was during the time of the government WPA programs to build new schools. My father, at that time, was superintendent at Sparks, and I think he was the first one in the west to get the money to build a new school. For a year we went to another school, when I was in second grade, Mary Lee Nichols School. Then we came back when I was in the third grade and it was a very nice school. Robert Mitchell School is still there and had its fiftieth reunion not too long ago. It was a very worthwhile WPA project.

One of the things that my dad tells about this story is that in order to encourage the local community to raise some of the bond money that was required, he mentioned that when they came over to the old school he instructed the janitors to take out the 100 watt light bulbs and replace them with twenty-watt light bulbs so it would be a little drearier. It was plenty dreary the way it was, but I thought that was kind of a good technique. The other thing that I remember about that school that was interesting is that, true to government bureaucracies of all sorts, there are many forms to fill out, and in those days the copies all had to be made with carbon paper. Everything had to come with thirteen copies; I remember my father telling me that when he invited the Director of WPA in San Francisco to come to the opening of the school, the invitation said, "Please send your acceptance in thirteen copies."

[laughter] I guess some people credit the beginning of modern bureaucracy with the New Deal. That's a cute story. After the Robert Mitchell School, well tell me this, what did the Robert Mitchell School building; since it was this WPA project, what did it look like? And you're in a small town, right?

Yes.

So the classes are probably fairly small, right?

Fairly small. There was one through sixth grades. It was in a very nice brick building with good playground equipment, basketball courts and so forth. It was, and still is, a very nice, well-built brick building.

Single story, multi-story?

Single story.

After Robert Mitchell School, where did you go?

At that time they had junior high school, which was from the seventh grade to ninth grade at Sparks Junior High School. Robert Mitchell was about two blocks from our home, and Sparks Junior High was also about two blocks from our home in the other direction. Everyone walked—my father walked to work, I walked to school, and both of my sisters walked to school.

The small town living is very appealing to us these days, I think.

[laughter] I would take my little wagon for my mother to the grocery store and pick up things and bring them back in my little wagon.

And nowadays it seems we don't go anywhere unless we get in the car, right?

That's right.

And after Sparks Junior High, what was the next school?

Sparks High School. That was from sophomore to senior years.

Do any teachers from your formative years stand out in your mind?

Sure. I had some good teachers in elementary school, I remember very well. My second grade teacher I particularly remember because I thought she was the most beautiful woman. I was crazy about her. Grace Cantlon was her name. She still lives in Reno. I see her now and then. I actually remember my kindergarten teacher, Miss Dole. One time when I was giving a speech, she came up to the podium and asked if I remembered that she was my old kindergarten teacher. [laughter]

Then I had, yes, in the fourth grade, Emily Tholl. She was a very athletic teacher, and she had our class participate in a tumbling team and put on a performance as a tumbling team. Inez Gilles was a fifth grade teacher, an excellent teacher. Doris Shaver was the sixth grade teacher, very fond of her. Seventh grade, was Miss Shapecase. Eighth grade, we had several teachers. One was Mrs. Hart, who taught English and Latin. I thought she was an excellent English teacher. Miss MacNamara was an excellent math teacher. Miss Dunn, in ninth grade, was a superb teacher. They named a school after Miss Dunn. She taught Civics.

In high school, we had some excellent teachers too. Merle Singleton was one. He taught Art, Speech, and Dramatics and devoted a tremendous amount of time to extracurricular activities. In those days, it was part of the teachers' job that they did these extracurricular activities. Merle would put on several plays during the course of the year. It was a lot of work for him. In those days, the teachers would all come to the school dances, too. It wasn't a chore. They kind of liked it. Another teacher, a Speech teacher who was very good, was Kathleen Sweeney, and she coached our debate team the last years. And the History teacher, Velva Trulove, our English teacher, Evelyn Mantle. Recently, I participated in a thing they call

"Voices" that is put on for the university library, and we were to pick particular poems that we liked. I kind of paid a little tribute to Evelyn Mantle because of how much she stimulated me in getting involved in English. I stated that the poems I recited were poems that I had remembered from Miss Mantle's high school English class. Kipling's "If" was one, "Ozymandias" was another, and Milton's sonnet on his blindness was a third.

Those are excellent choices.

I like those.

What's even more remarkable is that you remember all of these people. What a wonderful memory you have.

Well, it was a big part of my life.

It sounds like school was important to you.

Very important; I loved it. I liked the classes and I liked the extracurricular activities.

Besides the sports, what did you do?

Well, I was active in all the school plays. They were a big thing for the community. We had great turnouts for our school plays. We thought we were very important putting these on. And then they were pretty well done because Merle Singleton was so good at directing. Also, we had a very active debate team program, and we would participate in the state tournaments and contests in Speech and Debate. Actually, my partner, Jane Truex, and I were the state champions for the debate team my senior year.

Do you remember what the topic was?

Yes. It had to do with the Taft-Hartley Act; that was, I guess, my junior year. The next year was World Government. That's right. Interesting enough, my partner and I were state debating champions for the state one year, and the next year, Barbara, my wife, and her partner, were state champions. [laughter] Sparks was doing real well in forensics.

Yes, indeed, indeed. Now besides debate, were you also doing other kinds of speech?

Yes. In high school, and I went on in college and did a lot of it, but in high school, yes, they had oratory contests. The Lions Club put on one, in particular, and I entered it, and I thought it was a wonderful speech. I lost. My debate partner, Jane Truex, won. [laughter]

Was it a speech you wrote?

Oh, yes, a speech I wrote. "Jim's Gone Now" was the name of it. It was about a letter from a soldier received after he was killed in the war. I thought that it was just a tremendous speech, and so I gave it again at the state forensic meet, and I lost there again, too. My dad said they have the valedictorian and salutatorian give speeches at graduation and he said, "If you give that "Jim's Gone" speech again, I'm going to crown you." [laughter]

Apparently, not everyone shared your opinion of the quality of this speech.

No, no they sure didn't. [laughter]

That's a great story. Besides debate, and speech and sports, that doesn't leave a lot of time for other activities in school, does it? Were there other things that you were involved in?

Yes, I wrote a column for the student newspaper. I was the sports editor so I wrote a column called "Hug's Plugs."

And what sports did you cover?

All the sports.

And was this an opinion column, like they have critics of sports now, the Jim Murray types, or the Mike Downey's or....

It was kind of a very friendly column about how well we were doing and what wonderful athletes we had at our school and why we should, if we lost the game, why we should have won. [laughter]

I see. Well, you must have been a busy young man in high school with all these activities.

I loved it.

One of the things that comes to mind in looking back as an historian on this period, is that—and you sort of touched on this—this was the Great Depression. Do you recall what it was like, in that time? Do you recall there being periods of economic hardship?

I do. I remember that when I was about four or five years old, we lived in a house that was by the railroad tracks. Sparks is a railroad town and that was the major employment, and we lived in that first house, quite close to the tracks; I remember very frequently people who would be traveling on the rails or unemployed people would come to the back door and ask for a sandwich. That was just ritual, if somebody wanted a sandwich, you gave them a sandwich. People were kind to each other in those days, that understanding of difficulties that others were having. We were fortunate because my father had a good job, but I do remember that we were not allowed to have two in the family with a job. For example, my mother couldn't work in those days. I mean one income was considered enough in the community. But people were understanding to each other. Grocery stores would extend credit when people were in tough shape. Everyone kind of looked out for each other. They were tough times.

Do you have other memories of that time?

Only that, generally, people just didn't have an awful lot. Small things were very important, like at Christmas or birthdays. They would be celebrated with as much fun and so forth, as now, but with small presents; smaller things became important and the same thing with toys and bicycles. It was a very big thing to have a bicycle. I remember I got one for Christmas and was very excited, but there was one boy whose father had died in the neighborhood that didn't have one, and Harry Foote, one of the businessmen, got him one. It was a big thing. We all thought that was great.

Yes. That's interesting, that someone would reach out like that. I guess that's more indicative of small town life. I suppose people feel more of a sense of community and that they're all in the same boat, in a manner of speaking—much more so than we do nowadays.

The biggest salaries there were the railroad workers.

Now, were they union then?

You know, I really don't know. I have the feeling that they weren't earlier. I know they

became union. But in the early part of the Depression, I don't think they were. Reno was always treated as the rich community. Sparks was the working-class community.

Oh, is that right?

Yes, Reno was, when we grew up, I mean we always thought that's where rich people lived.

What was the train company that came through there? Was that Union Pacific or the Southern Pacific?

Southern Pacific, through Sparks. And it was the major roundhouse with the repair station and the refueling station, and that sort of thing. It was one of the major stopping points along the way. They had a big huge roundhouse where they had machinists and all sorts of people that could repair, principally the locomotives but the cars too.

Any of that still there?

No. It all got removed. When the diesel engines came into being that kind of undid the need for all these repairs to the steam locomotives. The way stations were a lot longer distances along the way, and Sparks, as a railroad community, really kind of came off the map after awhile.

I imagine you must have had friends and playmates whose fathers worked for the railroad.

Oh yes. A lot, many Italian and Mexican friends. We really didn't have any or very few African blacks, as they would have been known then, at the time, but we had a rather large Mexican community and Italian community there. A lot of the Mexican community had been brought in as section hands and so forth. The Italian community was largely composed of farmers.

Is Sparks also a farming community?

Yes, it was.

What sorts of things did they grow around there?

Well, potatoes and hay and vegetables of all sorts.

I see. So the vegetables were probably what, bound for market in Reno and some of the other towns around Nevada?

Yes, that's right.

Any childhood friends that you recall?

Well yes, I was just going to mention when we were talking about the Italian community, one of the other judges on our court, Judge Melvin Brunetti, and I were high school classmates.

Oh, is that right?

He was two years behind, and he was one of the Italian community that I was just mentioning, and his father had a grocery store in Reno and farm contacts, and later had a fish farm. I really got to know Mel Brunetti in high school. Earlier, I guess because he was younger, I didn't know him as well.

So you were friends in high school?

Yes. And in college. In fact, when he came to college, I got him to join my fraternity.

Oh really?

Yes. And I got him to run for junior class president. So, yes, we have been friends for a long time.

You go back a long ways. Any other friends from that time period that stand out in your mind?

Well, one who was a very close childhood friend was Bruce Shelley. He was three years older than I, but we played a lot together—he and Gordon Foote and Eddie Reed and I. But Bruce, probably, is interesting because he is a television writer down in the Hollywood area and he has written a number of plays; he used to write, or screen things principally for TV, like "Get Smart." I don't know if you remember "Get Smart."

Oh sure, I remember "Get Smart."

He wrote a number of those. "M.A.S.H." He wrote a number of "M.A.S.H." programs—very clever writer. Always was the clever writer in high school with the newspaper. He's always been a very clever, very bright person. But he and his sister, Alice, were very good friends. Ed Reed and Eleanor, his sister, and Gordon Foote and Margie Foote, we all played together with my sisters.

Sounds like a pretty nice place to grow up, Sparks, Nevada.

It was. It was. It was an excellent place. Yes. In high school, in my class, Jack Fountain was a close friend, Joe Bugica, Vincent Laviega, and Charlie Burke. Vincent is still in the Reno area. He is an executive with the power company. Jack Fountain was a very successful real estate developer. Unfortunately, he died a few years ago. Joe Bugica is with Westinghouse back in Pittsburgh. Charlie Burke is a college professor. We were friends, all of us, through college.

I understand that you participated in Boys Nation.

Yes, that's right.

Can you tell us a little bit about that?

Sure. The American Legion sponsors Boys State throughout the nation, in which juniors in high school are brought together from around each state, and they elect officers and a legislature and governor, and then each state selects two representatives to go to Boys Nation as the senators from those states; I was selected as one of those to go to Boys Nation and it was a wonderful experience. We participated then as senators back there. I met the president of the United States, who was then [Harry] Truman. That's also what President Clinton remembered as one of his highlights, was going to Boys Nation and meeting President [John] Kennedy.

Oh yes. I remember that. Yes.

Well, this was the same way with me. It certainly was a highlight in my life. We traveled back on the train, and I traveled with a boy from California who was a California representative. His name was Dwight Allen and a brilliant guy. We developed a fast friendship. Later, I met him when I went to law school. He was getting his doctorate in education and then our paths, oddly enough, have sort of been entwining since because he is on the International Board of the Baha'i religion with Judge [Dorothy] Nelson of our circuit. I haven't seen him since, but I

keep track of what he's doing through Judge Nelson.

Oh, that's great.

But the experience back there was really outstanding, and we certainly met key people there. I remember [Secretary of State] George Marshall was one that we spoke with at that time, and it was outstanding. I remember I had an exciting experience, at least for me—they had a dinner at which we could question the speakers there. As I recall it, I think the speaker was George Marshall, and we would ask questions, and then they awarded a book at the end to the person who asked the best question. And I was thrilled because I got the book.

[laughter] That's great. Do you remember what the book was?

Yes, it's called, *The President Is Many Men*.

How long was your stay in Washington?

It was a week.

One week. And you, of course, went to the White House and met President Truman. What were your impressions of Harry Truman?

Well, he was very congenial with all of us and gave a little talk. He made a point of having us each go by and shake hands with him, and he expressed the importance of this program, the Boys State and the Boys Nation, and I was very impressed with him. He was a very down-to-earth, solid-type person.

Well, that's certainly his reputation based in part upon a series of oral history interviews he did, with, I guess, Merle Miller, and it came out in a book called, Plain Speaking, *as I recall. If you haven't read that book I commend it to you because obviously he was influential in some way in your life, and it's a very interesting portrait of an interesting man.*

While we were back there, we each met our own senators, which was a fascinating experience for all of us that were there; our senators at that time were Pat McCarran and George W. Malone, and they were congenial, spent a lot of time with us to show what they did, and how they did it.

Now had you met either senator here in Nevada before going back there?

I hadn't.

So you're in Washington a week and what did you do besides go to the White House? You mentioned the dinner. You mentioned briefly a little bit about the Senate. What exactly went on at the Senate?

We observed the Senate in session and, as I mentioned, we went to each of our senator's offices, and they gave us quite a little bit of their time actually, explaining how things worked and what they did. Then we saw a lot of the areas of Washington, D.C. We went to the Supreme Court, then we went to the usual things like the Washington Monument, the memorials, Lincoln and Jefferson memorials, and the FBI Building, and the usual things that tourists do but, I'll tell you, it was mighty impressive to me at that time. I was thinking I would like to be back here in politics, at that time, I thought.

And how old were you when you had this experience?

Seventeen.

Formative. Formative. So coming back to Nevada with this experience as a seventeen year old, having met the president and seeing the Senate in action, did you see the Supreme Court in session?

Not in session. They showed us the building.

2

University Life and Career Choices

How did you decide to go to the University of Nevada, Reno?

I always wanted to go to the University of Nevada. My parents had gone there, and they spoke about how much fun it was and all their fraternity and sorority life, and my dad was a celebrated athlete up there, so I'd never considered going anywhere else.

That was it. It was foreordained.

I wanted to go there. And I wanted to do what he'd done. [laughter] He'd been student body president, I wanted to be student body president. [laughter]

Sounds like he was a pretty big figure in your life.

He was. He was the kind of person that everybody liked and what a nice thing to grow up when, you know, everyone is crazy about your father. Very popular guy, great sense of humor, very considerate of other people but with a kind of impish twist. I mean he was always a lot of fun because he would be kidding everybody and giving them a hard time, but they loved it.

So he was active in the community as well?

In a lot of ways, yes.

What sorts of activities did he participate in?

Well, through the school, he would do a lot. During the social functions that took place, he would do a lot. He would be on committees and so forth. My mother, also, would do a lot of those things. Of course, that's kind of part of a small community. A lot of people do a lot of different things.

So they belonged to clubs and....

Yes. Lions Club—that kind of thing.

And you sort of followed in your father's and your mother's footstep sounds like in being active in those kinds of things.

Yes, I did.

And so you went off to the University of Nevada at Reno. What year was that, do you recall?

Yes. I graduated from high school in 1949, and later that year, I went to the University of Nevada.

And I recall in high school, in that final year, you were showing me the yearbook earlier, you must have had some special honors bestowed upon you in high school.

I was selected as the "Outstanding Boy" of the class. Interestingly, that next year, my wife, Barbara, was selected as the "Outstanding Girl" in her class. Also, one of the things that I liked the most was in track. I was really quite a good hurdler, and actually both senior and junior years I won almost all the meets I participated in, except for the state ones, and I can still run both of those races over in my mind. It's like it was a movie. [laughter] In my junior year, this fellow from Las Vegas and I had almost identical times in high hurdles throughout the year. I mean we'd watch each other's newspaper clippings and it looked like it was going to be one heck of a race, and we were both so nervous that when the race was run, we both fell. [laughter] And the fellow that I'd beaten all year long won the state meet. I even got up and got third, if you could believe it.

Oh my.

And the second, in my senior year, again, I call it bragging, but I really was the best hurdler in the state, high hurdler. Low hurdler I was about even with another fellow from Elko, but high hurdles, I just, no way should I not have won. But unfortunately, I hurt my back during the year and it was an odd thing. It was the low hurdles that would throw it out until I would run the race, and you had to participate in morning trials for the state meet and for the Western Conference meet, but if I ran the low hurdles in the morning then my back would be thrown out.

I'd rush down at noon, and there was a physical therapist who knew how to put it back and got it, and he'd jerk me around a little bit and then we'd get back in, and I'd go back up and run in the afternoon. But I couldn't train very well, as well as I would have liked, and I was just sure I would break the state record that year. And the race that I say I run like it's a movie in my mind is that I got a wonderful start the first time. I was clear over the first hurdle and going to the second and the second gun shot rang out calling us back, and, boy I would have broken the record with that race, because I got a tremendous start, but I guess it was probably rolling; [laughter] in any event, we got called back and then if you broke a second time you'd be disqualified so I waited. I got a slow start, but I was really picking up and just passing this fellow and I nicked my knee, and it was just enough to put me back about a foot from winning that race. And I thought, oh no, I did it again. The low hurdles were different; I led it all the way, but I think I ran out of gas a little bit on the last hurdle and Jack Carter from Elko, who I see all the time now and is a real estate appraiser, and I kid him about it that he passed me up cold on the last hurdle. Oh well, I got second both times, but I sure run both of those races over in my mind.

Yes. I'll bet, I'll bet. Did you continue sports at the university?

I did. I played freshman basketball. In football, they ran out of money and

discontinued it for a couple of years. I did play one year when we were trying to get it started again but it was only limited. We played the alumni and a few things like that, but just to get it back started. I competed and I lettered four years in track up there. I was running hurdles, broad jump, and some relay. I was captain of the track team my last year. Yes. Track was my major sport there.

You mentioned that you had pledged a fraternity at the university. What fraternity was that?

ATO.

Which stands for?

Alpha Tau Omega.

Fraternities were pretty important at the university?

They were. Most anyone who really wanted to pledge a fraternity could pledge one or another. There were enough there that it was not an exclusive sort of thing, but it was a nice kind of a "club." ATO, when I was going there, it was also my dad's fraternity, was kind of the athletic fraternity. We usually would win the trophies for the athletic events.

So did the fraternities have sporting events, sort of intermural between themselves?

Yes.

Any co-ed sports?

You know there weren't any at all. In fact, there really weren't any women's sports at all. That's been a great improvement, that they have women's sports now. There were women skiers and that's about it. There really weren't any others in college.

Was there intercollegiate skiing or was this sort of a ski club?

Intercollegiate.

Oh really? So they would compete with other schools?

Yes.

From across the country?

We had very good skiers, too. I think we won one NCA championship.

Oh, I had no idea there was intercollegiate skiing. Of course, that's a great place to do it. But I would imagine that, in the early 1950's, skiing would be considerably different than what it's like now.

Well, the same kind of events. They would have the regular alpine events and cross-country and I'm sure the skiers have gotten better and the equipment's a lot better, but they were essentially the same events, slalom and downhill.

Besides being active in the fraternity and lettering four years in track, you must have had time for studies.

Yes, I did. When I was a sophomore, they gave a watch to the boy and girl that had the highest academic records at that time. I got the one for the male student.

That's wonderful. You're a high achiever.

I don't know.

What college courses stand out in your mind?

Well, let's see. I liked the speech courses really well and participated in the debate there too, and the speech contests with other colleges on the West Coast. I liked the speech courses real well. The political science courses were very interesting. I had a number of courses there. Russell Elliott was a very good professor, and Wilbur Shepperson, in those areas. English courses were quite good. Dr. Eldridge and Dr. Morrison both taught excellent courses in English. I remember one was "The Bible As Literature" that Dr. Eldridge taught that I thought was exceptionally good. And then I changed my major from political science to business administration because I thought, geez, if something happens and I don't make it all the way to go to law school or anything, I'd better have something that I can do. I decided that I was going to take business administration and concentrate a little bit on accounting, which I did. And so, those courses were good. I liked the business administration courses and the accounting courses.

When you graduated, what was your major, was it business administration?

Yes.

But it sounds like it must have been pretty early on that you had made up your mind that you wanted to go to law school and be a lawyer, is that right?

Yes, about the fifth grade.

Oh really? You're so definite about that. There must have been an important experience that shaped that desire.

Well, yes. Actually, I guess it was fourth grade. That teacher put on a little mock trial in our class, and they divided us up with attorneys and witnesses and jury and so forth. It was very well done, and I was an attorney for defending one of the fellows on a criminal charge, and I thought that was so much fun that, boy, I would like to do that. I would read biographies of famous lawyers, along the way and I decided, early on, that's what I want to do, be like Clarence Darrow and that group.

You must have read a biography of Darrow.

Yes, I did.

Do you recall which one?

No, I don't actually. I don't recall who the author was.

Were there other lawyers' lives that you read about that you recall that were influential?

Some of the early Americans, Daniel Webster, I guess I was quite interested in the early history at that time; Thomas Jefferson, I was trying to think, what other, well, there were a couple of other lawyers later on, I'm trying to think, there were about three or four other biographies that I've read along the way but I can't remember which lawyers were involved. Bill Fallon, I think was one and it's a shame I can't remember who the other ones were but there were, I read probably five or six biographies. I was big on lawyer biographies.

And what was it about lawyering that appealed to you as a child? Obviously, as an adult, you see it differently.

The court room. The excitement of trying the case and feeling like you were doing something to defend the persons that were innocent and to right the wrongs if somebody had been injured, that kind of thing.

So you saw yourself as a defense lawyer?

Yes.

... and not a prosecutor?

Really not as a prosecutor.

What did your mother think of this boyhood desire?

I think she thought it was a good idea. We didn't know any lawyers really, at that time. Well, there was one lawyer in Sparks, but it seemed like that would be a good idea. Yes. She was encouraging and so was my father.

So your father, didn't necessarily, I mean he's such a role model for you it seems, that he wasn't encouraging you to become a teacher or a school administrator?

No, no he wasn't actually. He sort of left it to me what I wanted to do, and I think he thought it was a good idea.

So, you pursued a course, first in political science and then in business administration. What made you think..., sounds like when you got to the university you might have had some doubts a little bit about this lawyering business.

No, I always wanted to be a lawyer. They told me that a very good major for law school was political science so that's why I enrolled in it. That was a good major for it. It's just that I got worried that, what happens if, you know, I go in the service and something happens I can't go on to law school, I better have something, an occupation that I can see what I'm going to be doing. And that's why I went into business and accounting.

Of course, about the time you were graduating from high school and going into college, that was the time of the Korean conflict, wasn't it?

That's right. Yes, yes.

And what did you feel about that at that time?

Well, I thought that I definitely should do my duty and serve in the service; I was deferred while I was in college, but I was in the Naval Reserve and while I was there I was training and going in the summer to what they called the "ROC" program, Reserve Officer Candidate, so that when I graduated I would be a commissioned naval officer, and I planned to go into the Navy, which I did.

Let's stick with the university a little bit. I want to learn more about your Navy experience, but at the university, you've mentioned a number of the teachers who were important to you and the courses. What about social activities? Most of it must have centered around the fraternity.

Yes, and I was very active in student government.

In what ways?

Well, I ran right away for freshman class president, and I was elected freshman class president. I loved the politics aspect of it. And I ran for student senator; I was elected senator

for two years and then in my senior year I was elected student body president. And that took up a lot of time. That was a lot of social activity there and, Barbara, my wife, was my secretary, the student body secretary.

Is that how you met?

No, we met in high school.

Oh, all right. Tell me about that.

Well, we met when we were in a high school play together.

Do you remember which play?

I can't remember what the name of the play was. I'm sure it's in the yearbook.

It wasn't something like Romeo and Juliet?

No, no it was, as I recall, a comedy. That was a very good social event because we'd usually go afterward, in those days, to the drive-in, which was the big thing, to get hamburgers and a milkshake, and that was kind of the date aspect of things. And my good friend, Joe Bugica, took Barbara, her name was Barbara Van Meter then, and I took Lorraine Lague, and during the course of the evening it just seemed that Barbara and I got along better, and he and Lorraine got along better so on the way home we just switched [laughter] from the front seat to the back. I think I was driving, and I think Barbara came up and sat with me and from then on we started dating. The only problem with it was I became crazy about her, but I had a competitor, Doug Byington, that she liked pretty well too, and we were both from the same football team and, I think as I just mentioned before we started, that I was on the football team and really happy I was first string. I thought I was going great guns and the first game I broke my leg and I couldn't play any more that season, so I was relegated to the stands with a cast watching Doug Byington, a very good halfback, running for touchdowns [laughter], so it was not a happy time. And later our team won the state championship too. That was sort of a disadvantage as far as dating competition. Oddly enough, Doug Byington and his wife are quite close friends of Barbara and I now. Doug married a girl, Nancy Houton, who I had dated quite a bit in college. We see each other quite a bit too at social events.

Well, that's nice.

Small town.

You'd already been involved somewhat in politics, as I understand it, at Sparks High School.

Yes. Just local, student politics.

When you got to the University of Nevada, Reno, I understand you were politically inclined then, too.

I was. It's interesting. My father had been the student body president when he went up there, and I thought, gee, that would be a nice thing, I'd like to do that if I could. So, I did get involved in student politics right away. I was the freshman class president, then I was a senator on the student senate for two years, and then I was elected the student body president. It seemed to work out.

What did you find most challenging about that kind of political involvement?

Well, it was certainly very stimulating because the university officials paid quite a little bit of attention to the student government, student officers, and we had a lot of responsibility for public expenditures of money relating to athletics; we had an athletic control board, we had the student finance committee, which was responsible for dealing with student fees, and we also were responsible for a student bookstore, and the thing that was good about it was we did have a lot of responsibility. One of the things that I was the most interested in at that time was, we did not have a student union building, so we organized a student effort to go around the state to lobby the legislature for a student union building; various representatives went to contact their assemblymen and senators in various areas and it was really quite successful; it was helped along a lot by a donation made by the Jot Travis Estate and, in order to utilize that, the legislature was encouraged to put up matching funds, which they did, and the student union building was built.

Now did this happen when you were student body president, your senior year?

Yes. Then it was approved and the building was built after that.

I see. When you first ran for freshman class president, were your fraternity brothers at ATO helpful in organizing a campaign?

They were. They were very helpful and very supportive. They took me around places and showed me the ropes and where to campaign and so forth. I remember the fellow I was running against was a fellow by the name of Bud Weiser.

[laughter] That's a funny name.

And he had very good campaign signs because he used all the Budweiser [beer] signs all over. It was kind of hard to compete with outdoor signs when he had all these neat Budweiser signs. I remember at college assembly where they were all introducing us before the election, we each got up to give a little talk, and I said that I really appreciated being able to run against such a fine slate of candidates and, indeed, I thought that Budweiser was really a very fine beer. I got a big laugh, and I think maybe that got me elected, I don't know.

[laughter] Well, it must be tough to run a campaign against someone who has instant name recognition. [laughter]

That's right.

When you were student body president, again that's obviously a much larger responsibility and it sounds like you took it very seriously—took it beyond the bounds of the campus, out into the state as a whole to lobby for this student union. Do you remember the campaign, though, when you ran for student body president?

Yes. Yes, I do. I think I had posters, and I had a several point platform. It seemed like there were maybe four; I'm not sure. I know one of them was to get the student union building. Another one was to get our athletic teams into a conference. We were an independent school, and I thought a lot of the students would be a lot more excited if we participated in a conference. And a third thing I think was to send ambassadors throughout the state to the various high schools to encourage our best students to come to the

University of Nevada. We did that, too, after I was elected. We sent people with kind of an entertainment program that they could put on at their assemblies. There was Janice Rozasco, a wonderful piano player who could imitate Jimmy Durante really well even though she was a woman she did a good job with it. And Jim Hulse, who recited "Casey at the Bat." That always went over really big. Jim Hulse is now a university professor at the University of Nevada, a historian.

He and I have spoken many times on the phone and exchanged letters. He also serves, as you probably know, on our editorial board for Western Legal History.

No, I didn't realize that.

He's been a big help to me.

Yes. Well, he's a fine person, a very able person. At that time, he was a very shy person. He sort of blossomed when he became involved in Dramatics and Speech and all of a sudden he was just a huge hit in his recitations.

That's nice, to know that some of that experience paid off for him. Getting back to your own experience in politics, it sounds to me like you're beginning to, at this point, to build some constituencies around the state perhaps. Did it ever occur to you that you wanted to perhaps run for a political office in state government?

Yes, I did think that I would want to. Yes, I did, at some time. But it was going to be quite a ways off.

And, at this time, if I'm not mistaken, you had changed your major from political science to business administration.

That's right.

So you're hedging your bets a little bit.

I was afraid that if law school didn't work out that I wanted to something that I could go out and get a job doing right away.

But you did graduate. What year was your graduation?

1953.

1953, you graduated with a Bachelor of Science in Business Administration?

That's right.

I imagine someone of your caliber undoubtedly graduated with honors?

I did. After I became student body president, I slid down a little bit. I think I graduated about fourth or fifth in my graduating class. But I was on senior honor roll and all that sort of thing. I was elected to Phi Kappa Phi, which is similar to Phi Beta Kappa.

3

U.S. Navy, Marriage, and Stanford Law School

In 1953, when you graduated, were you ready to go to law school?

Well, that was the time of the Korean War, and I was in the Naval Reserve while I was going to college, and my plans always were to, after I graduated from college, go into the navy to serve my time. I was in a program—an officer's training program—Reserve Officer Candidate, they called it. You'd go down during the summers for what was essentially the officer's training for two summers and then on graduation you'd be commissioned as an ensign in the navy. That's what I planned to do and that's what happened. Although I wasn't called up until September, so I had some interim few months between graduation and that's when I worked for an accounting firm.

Oh, you put your education to work. You'd studied accounting at the university. When you were called up in September of 1953, where were you, well, I guess you were already inducted. I don't know quite how that works. How does that work?

You aren't inducted until you are actually called up, and they are ready to take you somewhere. They were then sending me back to a supply school in Bayonne, New Jersey, and that's where I went in September.

So I suppose you had what would be equivalent to basic training at Bayonne?

Yes. Actually, the basic training sort of was what you got during the summers and then at Bayonne, New Jersey, it was specific training in naval supply matters.

What was that experience like? Being in the navy in Bayonne, New Jersey?

Well, Bayonne, New Jersey, was interesting. We enjoyed it quite a lot too because on weekends we were able to go into New York and see the plays and musicals and that was an exciting experience to us. I had three guys that I roomed with, and we frequently would go in. One thing I'd say about New York, New York is always thought of as a cold city to other

people. They certainly treated the military people very well. Lots of times when we would go into the city and not have tickets to a play where someone was unable to use the tickets, they would give us their tickets.

That's nice to hear. How long were you stationed in Bayonne?

Six months.

And then where did you go?

It was interesting because during the time I graduated from there and was sent to my next assignment, we were given about three weeks off for leave. And during those three weeks, I married Barbara.

Oh, I was going to ask you about that. What was it like to be in Bayonne with Barbara out here in Reno?

Well, I was lonesome for her. But we wrote every day, and we planned a wedding, that is, she planned the wedding; I showed up about a day before to get married the next day, and we then went on our honeymoon. Not having gone to very many places, we chose to go to Los Angeles [laughter] because neither of us had traveled much. But there was Hollywood. We were anxious to see that sort of thing. It was interesting, on the assignment of duty, I had envisioned that I would be joining the navy to see the world. When I put in the preference for duty, you fill out a little card. I've since learned better how to do that but I put, first, European theater, second, Asian theater. Barbara was kind of excited that maybe we would get assigned to one of those areas; it would be exciting. The captain of the school had come from Hawthorne, Nevada, and we each had a program where we'd sit with the captain, and he found out I was from Nevada. I didn't want anyone to think I'd be real happy to be assigned back to Nevada so the third preference for duty I put "Not in Nevada," which was a dumb thing to do because I'm just sure that when some person in the bureau of personnel got a hold of that and said, "We'll fix this guy." I was stationed in Hawthorne, Nevada, at the naval ammunition depot—I became a desert sailor. I called Barbara, she was all excited to hear where we might be going and I said, "Well, it's not all that bad. I'm really not assigned to long extensive sea duty." She said, "Well, that's good. But you sound like you got Hawthorne." I said, "Yes." [laughter]

My recollection of Hawthorne was, I played football there in high school and the wind came up so strong in the game that you could barely see from one side of the field to the other, dust blowing. I remember one fellow on our team, Orin Parks, kicked a punt that went, believe it or not, two hundred yards. [laughter] It went the length of the football field, over the fence and rolled out in the street because it caught the wind. My recollection of Hawthorne was that, and I remember thinking oh, I'm not real happy about that. But it worked out fine. We enjoyed it very much. I was the assistant comptroller on the base and dispersing officer, and I was there for the remainder of my two years and I really liked Hawthorne a lot.

Was your wife able to come down and join you there?

She was.

Well, it must have been a pretty pleasant duty, all things considered.

It was. It worked out very nice.

It doesn't sound like Hawthorne was hazardous duty.

It was not hazardous duty. Actually, the Korean War ended just a little bit before I graduated from the supply school. I think a lot of us were scheduled to go on aircraft carriers at that time and then when the war ended that changed all that. I think that's why a lot of us were assigned to shore.

I see. So you were, when you were mustered out in Hawthorne, you mean, you served your whole tour there?

Yes.

When you left the Navy, what did you do then?

Went right to law school.

And how did you come to choose Stanford?

Well, actually, I thought about going to a school in the East just to get more of an eastern experience, but we had a baby that was born just about five weeks before my tour of duty ended at Hawthorne and thinking about it, it seemed more realistic to go to a west coast school; I was very happy to go to Stanford.

Had you applied to other schools?

I had applied to other schools, and I had applied to Stanford; the other thing that encouraged me was I got a scholarship there so that helped me.

Oh that always helps direct one's attention, doesn't it? It makes choices easier. What stands out about your experience at Stanford?

Well, one thing that stands out is the first day of class there was a professor there by the name of George Osborne, who had a very deep commanding voice. I recall the first day he began asking these questions using the Socratic method and making us realize that we had to be very careful in our thoughts and expressions because he was a brilliant man. It was a little bit like the movie *Paper Chase* where he just could scare the very dickens out of all of us. He eventually during the year went around the class and got everyone. It took him a little longer with some of us than others to realize we were complete fools. But eventually he got us all. Even though he scared us so much, it was a very valuable thing in my mind. It made us realize that we had to do some very critical thinking, and we couldn't just sort of coast along like sometimes we do in some of our social science classes where you just talk on and on. You had to reason very carefully, and you had to be able to support what you were saying. And it was a very good thing, but he really made us all realize what we had to do to think like lawyers. In the end, he was a very kindly man. That was his last year at Stanford and then he went to Hastings. We're all very fond of him. We gave him a big party at the end, but I'll have to tell you he sure scared us to death.

Maybe that was a good thing.

It was a good thing. Law schooling was a good thing.

And what was his subject. What did he teach?

Personal property in our first year class. His expertise was in mortgages. He wrote a book on mortgages but he could teach a lot of things, Equity, I'm sure he wouldn't have

had any trouble teaching most any subject. He had command of it all.

Do other professors at Stanford Law stand out in your mind in addition to George Osborne?

Yes. I thought we had some very outstanding professors. Professor Shepherd taught Contracts, Wes Malone taught Torts, Keith Mann taught Labor Law, Professor Thurmon, who normally taught Torts and Tax, but we had him for Tax because he was taking a sabbatical. He later went on to become Dean at the University of Utah. Let's see, one that was kind of interesting was Bill Baxter, who is still teaching there; Bill Baxter was a student just two years ahead of my class. A brilliant person; he came back to teach; he taught some of us who had been there when he was in law school. He served one year as a law clerk and came back and taught Administrative Law.

As a law student, most of your time has to be taken up in studying. I know it's just an overwhelming experience to go to law school. I know that from talking to friends and my brother and people who became lawyers. But did you have any time for extracurricular activities. Were you involved in politics?

I wasn't involved in politics, but other than that we did a lot of talking in the student lounge about politics, that's for sure, but as far as being actively participating, I did not. I was one of the married students there. We lived in the married student housing area, which at that time was an old army barracks in Menlo Park. We got to know each other very well, because the walls were paper-thin. A lot of us had little children, just babies, one or two years old; I remember our apartment had a little courtyard and in the middle of all the apartment houses all the little kids would go out there and there was quite a little biting each other [laughter], but we got to know everybody pretty well there. I do remember there was a whale of a change going from the base at Hawthorne where we had officer's quarters, a nice brick house and a basement and everything, to the married student housing at Stanford. I remember when I brought Barbara down in the car, the baby was crying most of the way and it was kind of a tough trip; I remember when we went into the apartment, the couch was a single bed with a mattress rolled up on it. The kitchen cabinet was a metal steel locker and it was turned over on its side and there was a kitchen chair that was right in the middle of the room. I remember Barbara went in and this baby was crying, and she sat down in the chair and started crying. [laughter] That was our introduction to the student housing. It worked out and it was fine, and we had a lot of fun there and we did have a lot of social interaction with all those married students that were there, and they have remained good friends ever since.

That must have been a bit devastating. A young father brings his wife and baby to a place like that and then it's just, it must have been overwhelming. Of this circle of friends at Stanford Law, any particular people stand out in your mind?

Well, the ones that we were the closest to were the married students. Our next-door neighbor was John Hopkins and Alice. John is a practicing attorney in San Jose, a tax attorney. Jerry Mise, and I think he practices in Washington. They were a class ahead. And then there was, in our class, Robin Faisant, Art Leinwald, Guy Blais, Skip Crist, and

Bill Owen, were married students that, as couples, we palled around together. It was very pleasant. It was fun.

You have a remarkable facility with names, I think. You remember people from your past with a great deal of ease. I think that's remarkable. This experience in law school, were there particular subjects in which you excelled?

It's funny the way that works out sometimes. The ones that you may think you're the best in you don't necessarily get the best grade in. I liked a number of subjects. I liked Contracts and Torts and Constitutional Law, and I liked Trusts very much too. I thought I was a real star in Trusts during the summer. We had a visiting professor and it turned out that I got a C+. That's the only C I ever got in college or law school. It also kept me from getting on Order of the Coif. It was a subject I thought I was really good in. [laughter]

It's funny how that works. So, at law school, you had a lot of interests. Were you involved in, I think you were involved in the law review, weren't you?

I was. At that time what they did is they would offer an opportunity to be on the law review if you were in the top, it was either the ten or fifteen percent of the class, I think it was maybe the top fifteen percent of the class. I was thrilled to be selected for the law review. I wrote a comment and participated in it up to a point, then I had an opportunity where I could possibly take the Nevada bar early. Being married I was very anxious to get started as soon as I could when I got out because we didn't have much money. I was going to get out in January of 1958 but they don't give the bar twice a year. They only do it once in Nevada, and they don't give that until September, or didn't at that time. I had the idea that maybe I could petition to take the bar before I graduated from law school. Russ McDonald, who was then actually head of the legislative council bureau, had done it for one other law student and so I contacted him, and he said, "Yes," he would file a petition to the Supreme Court. The court granted the petition. So then I figured I better study hard. I then dropped off the law review so I could study for the bar for the quarters just before I took the Nevada bar. That worked out very well because I passed, and then when I did graduate in January 1958 I could start right away practicing.

Well that took a lot of foresight it seems to me in wanting to do that. You must have gone, did you take any breaks, any summer breaks while you were in law school?

No, no.

You went straight through?

That's right. Which was a very good program at that time for a married student. And at that time they didn't have all these clerkships that everyone can go to during the summer. You would have to find a job somewhere and so it was just a lot better to go right straight through for me.

When you studied to take the bar in Nevada, were there any organized bar review courses?

No, I just studied from my notes in law school and outlining.

And where did you take the bar exam?

In Reno.

In Reno? At the courthouse?

No, it wasn't at the courthouse. It was in some place that was like an auditorium. I think maybe it was the Elk's Hall.

Was there anyone else there?

Yes. All of the persons taking the Nevada bar were all there. Because that was the normal September bar exam for the whole state.

Oh I see. So when you passed the bar, what did you do then?

Well then I was a unique animal in law school. People were wishing they had that behind them too. It's funny because I came back and I think about October I found out I'd passed the bar so I had a couple months there where I had passed the bar, and they were worried about taking the bar yet, so I was a celebrity [laughter] among the law students. Oh, they thought that was pretty good.

A celebrity once again, I should add. You've had a lot of honors and celebrity throughout your schooling years. You graduated in January of 1958?

Yes.

4

Early Law Practice in Reno

And you have the bar exam behind you—a unique experience for a new graduate from law school. What happens next?

Well then, I had already made arrangements to join a firm with two of my college classmates who had graduated earlier. They were a little older than I was, about three years older. But I had known them both in college. Particularly I knew one, Charlie Springer, quite well because we trained together in track. He was a sprinter, and I was a hurdler, and we used to run together and train together and we would talk about what our ambitions were and so we got to be quite good friends; and so, I talked to him about it and they had, Springer and Howard McKissick, had just formed a partnership the year before; I had an arrangement to go in with them, the first year as an associate and then after the first year I'd be a partner the next year. And that was a fascinating experience. We were partners for five years.

And where was the practice?

It was in Reno. Very close to the building we're sitting in.

And just the three of you in the office? Other employees in the firm?

We had three of us, and one secretary.

And what sorts of business did you have?

We were just starting and so we took any kind of business that came in the door. And that made it very exciting because we had to learn a lot of different things, but it was a very general practice. I remember very shortly after I was there, Howard McKissick came in, his door opened right into my little office, and he had a person who was charged with landing his airplane on the street in Gerlach, Nevada, a very small town in northern Nevada; he was charged with, I guess it would be a traffic offense, and I remember Howard came into my office and introduced me to the client and said, "Here's Mr. Hug, he's an expert in these matters." [laughter] I hadn't realized that I was

an expert on landing planes on the streets, but it was interesting... and a lot of our practice had to go that way. We had to learn as we went. It was sure fun.

Well, what was your reaction to that, to being declared an expert in airplane traffic violations?

I had to clear my throat and pretend that I was. [laughter] Then I quickly went and found out all about it right afterwards.

There was an airplane at McCarran Field yesterday, I think they could have—over here at the airport—they could have used expertise like yours.

In the accident where the plane collided with the bus, I should have been there.

[laughter] We're going to have to edit that out. [laughter] Well, do you remember other early cases?

Yes. That was one of the nice things about our small firm practice was that we got into court a lot. One of the things where I was really learning to try cases was in the criminal appointment process in the federal court, and at the state court where they would appoint young attorneys to represent indigent defendants. At the federal court you'd do it for free, it was part of your responsibility as a lawyer and anyone who became a lawyer automatically got on the roll and they'd be called. The judge would call you over and you would represent people. I had several trials there that were really learning experiences for me and it worked out pretty well because, it worked out for the defendants because you worked really hard for your clients to give them appropriate representations. There was one that I think contributed to my becoming a federal judge.

Oh, now that would be interesting. Tell us about that.

[laughter] This is about Bill the Booster. Clarence Junior Richards was charged with two counts of passing counterfeit bills at one of the local casinos, twenty-dollar bills, and he had kind of a bad rap sheet, pretty complete rap sheet. When I went over to represent him, I had been furnished this so I could see that he wasn't a person who had a stellar record. And I asked him a question that now nobody ever asks, no defense attorney asks. But when I went in I said, "Mr. Richards, you're charged with passing counterfeit bills. Did you do it"?

And he said, "No, no, no Mr. Hug, I didn't do it."

And I said, "Oh."

And he said, "No, I wouldn't want to get mixed up with one of these federal raps at all."

I said, "Well, you've got kind of a bad record here on this sheet I have."

He said, "Oh, I know it's a terrible record but I've really reformed. I have a new occupation. I'm very happy with it. I certainly wouldn't want to get tied up with any federal offence."

And I said, "Well, that's good. What is it?"

He said, "I'm a booster."

And I said, "A booster?"

He said, "You don't know what a booster is, do you?"

And I could see I went down in his estimation quite a bit. I said, "No, no I'm sorry Mr. Richards, I don't know."

He said, "A booster, a booster, a shoplifter."

I said, "Oh, oh, that's, that's really good, uh, nice work." And he said, "Well, that's the secret of it."

He said, "I don't ever really take enough to be guilty of a felony, and I just go around to various stores. I use the 'derrick' system where I put a coat over my shoulder and bring things up under my arm." He demonstrated it to me and I said, "Well, that seems to work well."

He said, "Yes, but my girlfriend is really good at it."

I said, "Oh."

"Yes, well she went to booster school, he said."

Booster school?

Yes. He said, "In Los Angeles. They have a six-week course and at the end of that, when you've completed it they'll either put you on their payroll or else they'll arrange to fence the goods. She uses the 'big purse' system."

I said, "Well, that's wonderful. Well, you know this is really interesting, but I don't think it's going to make much of an argument for the jury."

He said, "Well, yes, I suppose not."

But I said, "You can plead guilty to one charge, and they will drop the other. You know, I'm sure willing to try this case." And he said, "Well, I really didn't know they were counterfeit bills."

He said, "A fellow gave them to me in the bar and said, 'you go gamble them and we'll split the winnings.'"

He said, "I didn't know they were counterfeit."

I said, "Well, I'm willing to try it.

So he said, "Well, I don't know, maybe we should plead guilty."

So we determined that we would reveal this to the court that we had an offer, a plea that he could plead guilty to one of the two counts. Judge Bruce Thompson was the judge. Bruce Thompson said when he heard this, he said, "Well, I understand you want to plead guilty but not for the reasons that you are guilty, is that right?"

Richards said, "That's right."

He said, "Well, I'm not going to accept that plea."

And of course, that's the law now. And so, we tried the case and during that time I really got to like this fellow. He had a good sense of humor, and he had a lot of ability and I would talk to him and say, "You know, if we can get out of this, you really ought to go back to Montana and join your family, there are a lot of things you can do, you'd be a good salesman."

"You're right, Mr. Hug. If I ever get out of this thing, you're right. I'm going to go back to Montana, straighten out my life." I said, "Well, I sure hope it works out for you." Well, lo and behold, the jury acquitted him, and we drove back that night. At that time the federal court was in Carson City, and we drove to Reno, and I let him off at the hotel. And he said, "I sure appreciate what you did for me, Mr. Hug, I'd like to know your size." I said, "My size?" He said, "Yes, I'd like to boost your suit." [laughter] So you can see I really reformed this man. [laughter] Now the reason why I say that contributed to my being appointed as a federal judge is this: President Carter was selecting appellate judges for the courts of appeals, he had a commission. It was different than any other president did before or since. He had a commission of eleven persons, and you'd have to file an application form that had all sorts of questions. One of the questions it asked was, "Your ten most significant cases that you tried." And so I thought, well, just for the heck of it, it would be fun to put down that case. Either the commission's got a sense of humor or they don't. [laughter] I put down

a little kind of a short version of what I told you and, so, when I went down there the applicants separately were being interviewed. They would go around the table and each person would ask a question that you would answer. When it got to the chairman, he said, "I only have one question, Mr. Hug. Is that the suit?" [laughter]

That's an absolutely marvelous story. That is just great. That really is. That's a great story about a very significant case in your career. After your first year of working with Charlie Springer and Howard McKissick, did they take you on as a full partner?

Yes.

Do you recall what your salary was?

When I started it was four hundred dollars a month and then when I became a partner, it was one-third of whatever our net was, which would boost it quite a bit. As I recall, we were probably making somewhere, maybe eighteen thousand dollars a year.

And how did that compare with what your friends and colleagues might have been making in other professions? Do you have any sense of that?

At that moment, I think when I became a partner, I think, I was doing better than some of the others that were just beginning. Because I think then a starting salary was maybe a little more than that four hundred dollars generally, maybe it was five or six hundred, but then it didn't increase that much as mine did after the first year.

What was the legal community like here in Reno at that time? This is, we're talking 1959, 1960, early 1960s.

It was a small, friendly legal community where people, where attorneys trusted their word and each other, and would fight hard in court and when an attorney represented that he was going to do something, he'd do it. If he represented he'd shown you all the pictures, you could count on it, with the exception of a very few and everyone sort of seemed to know who they were. Then it was always very difficult for them because then they always had to tow the hard line because no one would believe them, but there were just very few, four or five. At that time, the other thing about the legal community was the divorce business was very big because the rest of the country had very strict divorce rules. California did; New York did. The only ground in New York was adultery, California had a long waiting period for divorces to be final, and so we had quite a divorce practice; as did any attorney, which was fascinating, in that, people would come establish residence here and, most frequently, we were trying to get the other side to appear through an attorney and resolve matters. That generally was what was done. But you meet some very interesting people. A lot of people, current residents here came as a result of that, doctors, lawyers, professors. Then eventually the rest of the world caught up with Nevada and realized that divorce was no longer such a big thing.

Did you handle any of these divorce cases?

Yes.

Any particular ones that stand out in your mind?

No, not really. We did not attract the major people that some of the larger law firms did, like Bobo Rockefeller and some of the celebrities that came here usually went to the

larger firms. So ours was more the common person, and I don't really remember any particular ones.

What were the grounds that were acceptable under Nevada law at that time for divorce?

Extreme mental cruelty.

And that was it?

Well, that was the one that was utilized. There were other grounds. There were several grounds, but that was the one that was utilized.

I thought that was the natural state of matrimony.

[laughter]

I hope my wife doesn't hear that. We have a very, very pleasant marriage, believe me. What other kinds of cases did your firm handle?

We had a pretty good personal injury practice. There was one case that sure stuck out in my mind. The person's name was Jim Caldwell. He had been thrown out of The Golden Hotel by a bouncer. The bouncer threw him out roughly, so that he fractured his hip on the concrete outside. Because Caldwell was thought to be sort of a derelict that had been sleeping in a chair, and so they were annoyed and threw him out. Actually, he was really not as much of a derelict as they had thought because he was a heavy equipment operator from Alaska, and he worked all during the summer in the season up there, and then he would come down here and gamble.

They did not view him as an outstanding citizen so they just tossed him out and fractured his hip, and they offered him nothing in settlement. I tried the case, and I was really surprised because that was, I think about my second or third year, and I wasn't all that confident in trial practice. I was very much intrigued by [Melvin] Belli's book on demonstrative evidence, and they weren't using much demonstrative evidence around here at all, at that time. So I went heavy on it. I got medical drawings of the pin that they had to put in, and I brought the pin to court. I remember, I don't know if this was good or not but it was fun to do, I had a skeleton that I'd gotten from the Veteran's Administration, where he'd been treated, and they brought it down in a closet, so I just let "it sort of sit there the first couple of days of trial. And I'm sure the jury was wondering what's in that closet so it was kind of fun to open it and there was this skeleton, which we could illustrate where the hipbone was broken.

You had quite a flair for the dramatic. It must have come from early influences when you were reading about Clarence Darrow and so on. Would you like to continue about demonstrative evidence?

Well, that's right. I thought, and I did this in trying cases in subsequent years, I thought there always should be something, if I could think of anything that was pertinent as a physical exhibit, whether it was a model or whatever it was, to keep up jury interest, because if you just sort of drone along speaking and examining and cross-examining, the jury's inclined to lose interest. I always thought that it contributed a lot if you could have some evidence that would bring home your point and keep the jury particularly interested. And I thought that this did. It was a case where, the cross-examination of the bouncer who threw him

out, who was a pretty mean-looking guy, actually helped.

The other thing that was funny about it is, I remember dressing up Caldwell in one of my suits because when the adjusters examined him, he appeared in pretty bad shape. He didn't have very good clothes, with a scraggly beard and everything. Well, I got him all dressed up, and he loved it. And it turns out he at one time had been a song and dance man somewhere, so when he got up, dressed up in his suit, not only that, he added a little rosebud in the lapel of the suit when he came to court. So here was this "snappy dudie" guy that was a whole lot different than when the insurance company had seen him. But then he performed, he did well in telling what had happened and so the jury was kind of annoyed at the defendants.

Jury verdicts then were small everywhere, but especially small in Nevada. The highest verdict in Washoe County ever was ninety-nine thousand dollars. That person really became a paraplegic and so I thought if we could get five thousand or something I would be pleased. When the jury came back, I thought they said fifty-three hundred dollars, but my partner, McKissick, who was with me said, "No, they said fifty-three thousand." That just seemed like a whole lot of money to us. And it was good for him too because he left, and he bought a motel somewhere in the Northwest, so I was pleased that he did something significant with what he received.

You had more success reforming Mr. Caldwell than you did with Bill the Booster. [laughter]

Quite a lot more. [laughter]

Personal injury cases like that took up quite a bit of your practice?

Yes, we had quite an extensive personal injury practice and it kind of built up; if we were successful in one case that seemed to help in bringing on others. That kind of is the way our practice developed with what would happen to be known from a verdict or known otherwise. I remember one thing that brought in a lot of cases to me. It was a strange thing. I had been appointed to defend a person who was charged with escaping from Washington State Prison. Judge [Grant] Bowen had appointed me to defend this man. They were trying to extradite him. And so I went over and talked to him. He was in the Reno jail, and I said, "Well, how did it happen?" And he said, "I was working on a farm, and I just walked off." I said, "Where was the farm?" He said, "It was over in Oregon. Just over the line." I said, "Uh huh." [laughter]

The crime was committed in Oregon and so Washington couldn't extradite him, so I filed a writ of *habeas corpus* that Judge Bowen granted, freeing the man. It just happened there was a newspaperman in the audience who was there to see another case and mine was heard ahead of time. He was intrigued by this thing, so he put this article on the back page of the paper about a young attorney freeing a man on *habeas corpus*. He thought that was kind of an intriguing deal. I think I got four or five clients who read that in the paper and thought, this fellow seems to know what he's doing so I'll get him.

[laughter] Free advertising.

That's right.

Was that the Reno Gazette?

Yes.

Now, cases like the personal injury cases, would those be handled on a contingency basis?

Yes.

What was, starting out as an attorney, how did a typical day go?

Well, a typical day would be coming in to handle the cases that we had and, if it was a personal injury case, I would be working on researching the law or on developing the evidence. There were also transactions, wills, and contracts. Then we had some criminal cases that we were retained on. I remember there was a kidnap case in Fallon that we were retained to defend. That was kind of an interesting case.

Tell us about it.

I'll talk about that for a while. The boy's name was Nick Stanitz, and he was from Chicago. He was sixteen and the younger brother of a fellow who had been an outstanding athlete and was a celebrity in his school. This boy, I think, felt like he was a failure; he wasn't living up to what his brother had done. So he kind of went wrong with a group of people who just decided to take off across the country. All of whom were older. They were eighteen, nineteen, and twenty-two. I think there were three besides him, and you could see where he would be sort of taken up with these older people. This distinction between a sixteen year old and a twenty-two year old is big. They went across the country and they were robbing service stations and doing a lot of stuff. They were arrested in Fallon, and they were imprisoned in the county jail there. The girl had a gun in her brassiere and [laughter] she came out and she pulled the gun and set them all free; and off the four of them went, stole a car, and they were off, escaped from the Churchill County jail. And, of course, this just was terribly embarrassing to the sheriff's office and everyone there so they caught them, and they were charged with escape. Some of them, two of them, pled guilty and were given sentences of, I don't know, twenty years or something. He didn't plead guilty. He was, as I said, younger, and shouldn't have been treated as an adult. He really hadn't done anything. He'd just kind of gone along with it.

The parents had hired an older lawyer here who had been a judge. The brother wanted to hire us, and so we all kind of participated in it together, except the older lawyer carried the ball, and kind of kept us in tow. And he never put the boy on the stand, and we thought that was a terrible mistake. Nor did he call the bishop at his church, who volunteered to come up and testify. He didn't call them. I don't know why; it was a tactical thing, a difference of opinion, both McKissick and I thought this is a terrible mistake.

So he was convicted and sentenced to life in prison. We were just distraught with this because the boy was actually a nice boy. You could see what had happened to him. He had no prior criminal record or anything and here he had been caught up with these older people. All three in our firm started a big petition in the community to have his sentence commuted by the Board of Pardons. The Board of Pardons consisted of all of the supreme court justices, the governor, and the attorney general. The majority of that board can commute the sentence, but the governor has to agree. We built up a big fire in the community and got stuff in the press and got petitions forwarded around and we brought it to the pardon board, and they did

commute the sentence to one year. We were really upset about the original conviction, because we thought this was a terrible result, and we had participated in it. The pardon board's commutation was just.

The boy's family must have been beside themselves.

Oh, they were. They hired us after that.

And that must have been all over the newspapers, too. That must have helped the firm.

It was. Yes.

Quite a change from a life sentence to one year. Wonder what happened to that kid.

You know, I never heard after that. I would be really anxious to know too. We'll look that up sometime.

If you were researching a case in a typical day, did your firm have a law library or did you have to go over to the local law library?

We had a pretty limited library. We used the local library a lot.

That's here in Reno?

Yes. At the courthouse.

Did you get to know any judges? You spent a lot of time as a litigator in and around the courthouse. You must have gotten to know some judges at that time.

Oh, yes. Sure.

Any particular ones that stand out from this early period?

Yes. We had some very good judges, I thought. State court judges and a federal judge. The federal judge was Bruce Thompson. He was outstanding. Grant Bowen was a judge here for over twenty years, and he was excellent. He had kind of a grumpy way of doing things, but doing it very, very fairly, and you could always count on the fact that if you had a good legal argument, he'd sure see it. And John Barrett, who also was very smart, very fair. Clel Georgetta also was a very good judge. He had practiced here and was excellent. Judge Emile Geslin was excellent. They all were very good, and our [Nevada] supreme court justices were great too. When I was first starting to practice, it was Frank McNamee, Milton Batt, and Charlie Merrill, who later became a federal court of appeals judge, and whose place I took on the Ninth Circuit Court of Appeals.

Oh that's interesting.

He was a wonderfully fair judge, too. But one state judge, I sure shouldn't overlook mentioning, is John Gabrielli because sometime later I had a case that he played a big part in, but he was excellent; a very, very good judge. We were just blessed with very good state judges.

A strong bench.

Yes.

5

State Politics and the Gaming Control Act

In these early years, you were with Springer and McKissick for about five years, I think you told me?

Yes. At that time, we were quite politically active. Howard McKissick was a Republican, and he had been elected to the Assembly, state assembly. And later became the minority leader of the Republican Party in the Assembly. He was quite influential. And Charlie Springer and I were both Democrats, and we did quite a few things in politics. At one time, I was the county president of the Young Democrats, and I was the vice president of the state Young Democrats. One that was fun was that Charlie and I decided that it would be a fun thing to do to see if we could take over the leadership of the Washoe County Democrats. It had been in the hands of the old guard, and we decided they needed new blood. So what we did was we figured that the key was the precinct places, and it had always been in the past that the chairman of the Washoe County Democrats would designate precinct places. But when we got looking at the statute it was really the whole of the Washoe County Democratic Central Committee that was supposed to designate the precinct places.

We had a meeting of the Central Committee, and they were somewhat dissatisfied with the current leadership, and so the Central Committee designated precinct places that we felt were great, because lots of people were going to show up at the precinct places. You're there and your friends are there who elect the delegates to the County Convention. So, we had our county convention made up of persons selected that way. The chairman of the Washoe County Democrats and the old guard didn't go for that at all. They designated their own precinct places, and they had their own County Convention. So we now had two county conventions to go to Ely, Nevada, for the state convention and then to determine which one's delegates would be seated at the state convention. As it turned out, the "old guard" I was talking about was actually the partners of the firm I later joined. [laughter] So we went, and we presented our case and the other side presented their case,

and we had a committee hearing to determine which group they were going to seat. They seated our group. This was in the year that Grant Sawyer, who was a young man, was going to be running for governor. That was very exciting. We became part of the Sawyer team and, eventually, Governor Sawyer was elected.

This was also the year that the persons were going to the National Convention. The key was whether it was going to be Johnson or Kennedy and so those were exciting years. But one of the funny things about the Washoe Convention, where we did this, was that Charlie Springer, who was always very quotable in speeches, was making a speech and he then got carried away and referred to the existing governor who was a Republican as "a man of low brain wattage." [laughter] This got quoted in the newspaper. You can just imagine how this affected our firm. Because of Howard McKissick, we had this very nice retainer representing the State Gaming Commission; Howard McKissick had gotten this from the governor who did not appreciate being referred to in that manner. I know the next morning after that had all occurred, McKissick came over, I was over at Springer's house, and he came over waving the paper saying, "Look, I got a call from the governor and our retainer is terminated." [laughter] So it didn't all work out too well, some of that.

Politics cuts both ways, doesn't it? It's a two-edged sword. That's a great story. Now why do you think, was there a lot of behind the scenes maneuvering to get your delegates seated?

Yes. Oh yes. There was, and we tried to maneuver as much as we could but, I think part of it was the fact that part of the Sawyer forces wanted us seated and other forces who wanted other candidates for governor were pressing elsewhere, and that was part of it. I know that Bill Woodburn and Virgil Wedge were sent home and much later, Bill Woodburn and Virgil Wedge were my partners in the next firm I went with. [laughter]

Did this tend to break down along age lines? Generations? Was this a generational fight in the party?

It was. Yes. It was, actually.

Because Grant Sawyer was a young man at the time?

Yes. And it was kind of the new blood was going to do wonderful things for the Democratic Party.

Were you a Kennedy Democrat at that time?

Yes.

And the other side, were they Johnson people?

Yes. They were, actually.

Did you get selected to go to the National Convention?

No, and I was crushed. But I could see that there were other people who had certainly worked longer and harder for the Democratic Party. I was so happy that our delegation got seated that I graciously gave up. [laughter] I don't know if it would have made any difference. They probably wouldn't have selected me anyway, and I thought it would have been kind of unfair to press it when a lot of other people had worked longer and harder for the Democratic Party than I ever had.

Of course, that year the convention was in Los Angeles and John Kennedy was the nominee and Lyndon Johnson became the vice-presidential nominee.

Springer went to that. I think that was another reason, they couldn't select both of us. And Springer, of the two of us, he was the one that should have gone.

Did this contribute to the breakup of your firm?

No. No. Our firm broke up because Charlie Springer had an opportunity to be appointed to fill the remainder of the term of Roger Foley who was appointed as a new federal judge in Las Vegas. Roger Foley had been the attorney general, and he had nine months left on his term of office. Governor Sawyer said that he would appoint Charlie Springer if he wanted it, and Charlie wanted it. Harry McKissick had, right about that time, become quite ill and had some health problems and could not practice. That was, to think about it, a hard nine months, because I was running a three-person practice, except Roger Newton had come in as an associate in the firm. So Roger and I were running this practice, which by that time, was a pretty busy practice and that was very demanding. I remember getting up at three in the morning to do stuff because it was very demanding to try to keep up with the schedule the other two had had and didn't realize that they were going to be gone while things were scheduled. So it was between the two of us. One of the things you'd be interested in is the firm name, Springer McKissick & Hug. Herb Caen, a noted columnist for the *San Francisco Chronicle*, thought that our firm name was a neat name for a divorce firm, Spring, Kiss & Hug. He put a little something in his article, his column. Then, when Roger Newton joined, he had another little column. He said that he "noted that a touch of gravity had been added to his favorite firm." [laughter]

Oh, I wonder if that brought you any business from the Bay Area.

I think it might have.

Your firm at that time was on retainer from the Nevada State Gaming Commission. Is that right?

Yes.

Tell me, how did that come about?

Well, it had come about before I actually joined the firm, I think about the year before. And Springer and McKissick had been retained to represent the state in conducting investigations with regard to applicants for gaming licenses and also for any verifications or disciplinary proceedings that might evolve. Actually, I never really was involved with that either, when I came with the firm the other two, Springer and McKissick, did some additional work and then, as I think I've related, it was abruptly terminated when Charlie Springer made the speech at the [state] Democratic Convention. I think I've related what happened.

Yes, as I recall, Mr. Springer cast some aspersions on the Republican governor at the time.

Yes. Yes. He thought the governor was a person of "low brain wattage." [laughter] That was one thing about Charlie Springer, he always could utter quotable lines, and of course that hit the papers. That ended our continuing with the gaming commission.

I see. Well, that would do it. [laughter] I wouldn't be a bit surprised by that. But you yourself really didn't have any of that business.

I didn't. I did have some later involvement. Our firm became interested in the Gaming Control Act from that experience. And Harry McKissick was, at that time, an assemblyman in the legislature, and we sort of all three decided it would be a good idea to draft a new gaming act, no doubt with the hope that this would attract some gaming clients too, I suspect, but in any event, we set out to do it. We got the help of an administrative law expert from the University of California who worked with us, and we did draft the act that really is the framework of the present Gaming Control Act of Nevada. Establishing a Gaming Commission, which were part-time persons who were notable and responsible people that the governor appointed for staggered terms, and then a Gaming Control Board that was a full-time commission who were responsible for the investigations and that sort of thing. The Act has been amended some since, but the basic framework is the same as when we drafted it.

When did that act take effect. Do you recall?

I was trying to think. I would suspect it was about 1962, but I haven't looked back and I'm not sure of that.

And what was your intent with this act? Were there problems that you saw in the gaming that needed correction?

Yes, one of the main things was that the final hearing board was the state Tax Commission and that really didn't work out, and one of the things that we wanted to do was to establish a separate body that would be responsible for hearing and making the final decisions on gaming applications, gaming verifications, and so forth. This was the Gaming Commission that we wrote in the act. Then, we also wrote some procedures that had to be followed. Our real concern was the fact that gaming regulation is a tricky business, but it's essential; and, Nevada really has done an excellent job at looking into and investigating, very, very thoroughly, the people and their backgrounds who are applying for gaming applications to see if they have any ties with the underworld element and excluding anyone who does and excluding anyone or revoking a license of persons who associated with criminal elements. For example, Frank Sinatra's license was revoked at Lake Tahoe because of his connection with a known mobster.

There's recently been a book, I think it just came out from the University of Wisconsin Press by two historians investigating gaming control in Nevada, and the book has a title something like The Black Book.

That's right.

And apparently there was.

There was a black book.

There was a black book?

I think there *still is* a black book.

And can you tell me about that, what you know.

Well, those are persons who are not to be allowed in the casinos because of their relationship with the underworld, which Nevadans had thought endangered the whole gaming industry, and therefore the

casinos would not allow those persons in. It was trying to avoid the situation where there would be a sub-rosa control of casinos by underworld elements, and I think quite successfully.

What in your estimation has been the impact of gaming on the state?

Well, it's been a tremendous impact. The major industry of the state is the tourist industry, and it's founded largely on attracting gaming persons who are interested to coming to this unique kind of entertainment. The hotels are largely based on this kind of a tourist attraction.

One of the shifts that appear to be occurring now is more of a family orientation to the tourism and the gaming industry. What effects do you see this having on the state or on tourism as a whole?

Well, Las Vegas is particularly experimenting with that, and I think that it has not proved as successful as they had hoped in that regard because gaming and families don't work all that well together. I mean, I suppose the idea is to have a place where you can leave the kids and go play the slot machines, but it may be working better than I think. I don't know. They seem somewhat incongruous to me, but certainly I see MGM and a number of the places there have Disneyland kind of attractions, and it may well be that it works out. We'll see. Reno hasn't done that much.

6

The Nevada Board of Regents

Along with this experience working to pass legislation in state government, you've also been involved in state government in other ways.

Yes. I'll back you up a little bit on that to the university experience. In 1960, I ran for the Board of Regents. I had been president of the Alumni Association the year before. I guess it was kind of a faint hope on my part but I wanted to get into the political arena, and I was very interested in the university, but I just came out of law school, I was twenty-eight years old and I thought, well, I'll run for the Board of Regents. The thing that had encouraged me was there were two positions that were open, and I ran for the two positions in Washoe County at that time. One was Dr. Fred Anderson, who actually was a good friend of mine. I really had no hope of beating him, nor did I especially want to. The other, Newt Crumley, who was reputedly going to run for governor; that was all the rumor that he was going to any minute file for governor. So I filed for the position thinking that Newt Crumley, who was a very well-known state figure and owned the local Holiday Hotel and was a rancher and was a very nice person, but he decided, instead, to file for regent and then there were six of us running. I think some others had decided the same thing. I had no money really for a campaign, but I got some stickers out, signboards, and conducted a pretty vigorous campaign with leaflets, door-to-door sorts of things. In the primary, I actually did very well. I was very close to the other two, but that spurred Newt Crumley on so he put on about twenty thousand dollars worth of TV advertising, and so he and Fred Anderson were both elected. But I didn't feel too bad about that because I had come in fairly close in the general. Then, unfortunately, Newt Crumley was in a plane crash about two years later, about 1962, and was killed. Governor Sawyer had to appoint someone to fill the Regents slot, and he appointed me because I had come in third in that last race. That started out my career on the Board of Regents in 1962.

I was reelected several times and served there for ten years as a regent at the university. I

really enjoyed that. That was a very significant part of my career background. I was chairman of the board the last two years, and then you asked me about being deputy attorney general. They changed the election procedure to redistrict it. And it turned out there was only one position open for Washoe County so that my friend, Dr. Fred Anderson, and I would have to run against each other for one slot. I didn't really want to do that, and he'd been chairman just before me and, he was a very good friend. There was actually an opening for a position for university attorney, who was a joint appointment of the attorney general's office and the Board of Regents. And, I thought, well that would keep my association with the university; I'd like to do it. So that did happen and I was appointed as a deputy attorney general to be general counsel for the university on a retainer basis and that's what I did for the next four years. And I enjoyed that too.

During the time that I was on the Board of Regents of the University System, it's the whole state system, the board did some rather exciting things that I feel I had a part in that I'm proud of. One was that we developed the University of Nevada in Las Vegas. And, at the time, when I first came on the board, it was just a school with a dean that was associated with the University of Nevada here in Reno. During the course of that ten-year period it really became a full-fledged university with a president and also the same Board of Regents responsible for it, and developed a campus. We organized a foundation with two persons who in Las Vegas had a creative idea that it would be very important to acquire the land around where this campus was. There were just two buildings at this time on the university campus. It was very small, but there was a whole block of land around it and Perry Thomas and Jerry Mack were involved with a bank down there. At that time, it was Valley Bank, and they were willing to go around to get options on all of this property, and, if we had a foundation, we could acquire the land as the bank exercised their options. It would prevent the difficult problem that universities always face and that is that the minute the university wants the land it increases in value about three times; so all the land was optioned. Actually, I drew up the papers for the foundation, and got it started. I think I was the first secretary of it, and we acquired all the land around it for eleven thousand dollars an acre, which was a very good thing. If we were to try to do anything like that now, acquire some additional land, it would be very, very difficult. So that was one thing that was developed.

Another thing that was developed was we were anxious to establish a medical school because Nevada students were having a very difficult time getting into medical schools in other states. There would be some extremely qualified people who just couldn't get in because of the limited out-of-state enrollment that other state universities have and the extreme competition from the private schools. At the key time, Paul Laxalt, who was then the governor, had a relationship with Howard Hughes and no doubt got Hughes interested in university projects. In any event, Howard Hughes read about this in the paper, and he said that he would be willing to contribute two hundred thousand toward establishing a medical school. Well, at that time, that was a more significant amount of money than it is now, and it stimulated the legislature into thinking about it and others into thinking about it and got the ball rolling for a medical school.

At that time our theory was to establish a two-year medical school. There were six, two-year medical schools in the country

at that time and what they did was, they would conduct the first two years, which were academic years, and the second two years transfer to a medical school for clinical years. We would then feed our graduates into the schools where people had dropped out. There were vacancies that occurred. Those six schools were doing very well and we felt that it would work out for us, and it did. However, it got to be difficult raising money, finding money. Mr. Mansfield advanced it a great deal by making a pre-designation of a trust he had with a gift on his death of $1 million. That helped a lot. We hired a dean who was very good at not only helping with the fund raising, but getting through the very complicated things of getting it accredited. That's a huge problem. Las Vegas resisted it because it was going to be on the Reno campus. The Las Vegas campus had now grown, and they didn't want to see the medical school put on the Reno campus. One of the crucial defining moments was a joint session of the legislature, the senate and the assembly, and we all went over and made talks. Howard McKissick, by the way, was in the assembly at that time, and my father was in the senate, and they both worked really hard for it. Eventually, it passed by one vote.

So the medical school was established. It proved to be a real success. It was a two-year school for about, I'm just thinking back, but maybe four or five years, and then things changed on the national scene so that the two-year schools were not getting the federal money that they had previously gotten. So then the question became whether we could make it into a four-year school. Fortunately, we were able to do that, and the four-year medical school was established. Actually it is no longer resisted at all in Las Vegas, because a lot of the programs are conducted from there too. Some residency programs and some of the clinical programs during medical school are conducted there and so it's worked out to be a very successful thing. Besides, an awful lot of Las Vegas students were able to go to medical school who would have not been able to. I'm very pleased because my daughter went to medical school up here a number of years later.

Oh really?

Graduated and became a doctor, and so did her husband so I have a lot of association with that. The medical school recently had its twenty-five-year anniversary. That was a year ago. I was pleased to be asked to make the graduation address, and I was happy to do so because I have an awful lot of fond memories of that being established.

What a wonderful achievement. I mean something like that is really so important to a small state like Nevada that is essentially a rural state.

We now have about two hundred fifty applicants a year for the medical school. It has about fifty slots. So you can see that there had been a real need actually as it turned out. I was on their board of visitors for a number of years even after I was on the bench. So I have maintained a continuing interest in the Nevada Medical School. One of the other things that occurred during that time on the Board of Regents was, and we worked hard for, was to get the National Judicial College located in Reno. It had been located in Denver the first year. Justice Tom Clark had been very instrumental in continuing judicial education. He had really been the driving force in establishing the Federal Judicial Center and also for this college that was in Denver, the National Judicial College, for state

courts. We talked to him a lot about hopefully getting it established on the Reno campus. The big key was the Fleischmann Foundation here in Nevada that did tremendous amount of good, seed money for a lot of projects. This was one of them that they were very interested in. They were crucial, too. Because with a Fleischmann grant for twenty years, we were able to entice the National Judicial College to establish its headquarters in conjunction with the University of Nevada. The Fleischmann Foundation financed a building for it and then an annual funding, my recollection is, three hundred thousand a year. That has been a tremendously successful organization thanks to the very able persons who ran it, and are continuing to run it now. It's been very good for Reno because judges from all over the country come to take their initial education course, which is six weeks, and then there are graduate courses. So Reno is sending out ambassadors all over the country. People who come to Reno and say, "You know, Reno is really a nice place. It isn't just a mecca for gambling. It has wonderful recreational opportunities." We encourage them to bring their families. The judicial college has programs for the families that they run. I served on that board for two years too, and I enjoyed that. But what I was very pleased about was that we were able to get it to come to Reno.

That's quite a coup and a feather in your cap for that.

Not mine especially, but I worked with people who helped do it. There were a number of others that were as instrumental as I, but I just feel happy to have participated. The other thing that we did during that ten years that was significant, and this was again, in large part through the help of Governor Paul Laxalt and Howard Hughes, was to establish a community college system, and that community college system is in Reno, Las Vegas, Carson City, and Elko, and then conducts programs in other rural cities throughout the state and that has served a real need for adult education in particular. People who are going back to get retraining, as well as persons who have just graduated from high school, but it has served a real need for an alternate education to the strictly university courses. It's been very successful. Its total population of students is larger than both universities.

That's excellent. Let me back up a little bit and ask you a little bit more. Is it a year-round program?

It is. Its principal thrust is in the summer, but it conducts these courses throughout the year. It also conducts courses for visitors from foreign countries too, Russians and many other countries whose judges have come to this program. They've established a wonderful *esprit de corps* because the participants are a very hard working group. When the judges come it's no vacation really. It's a full day's work and a no-nonsense kind of program, and the judges appreciate it that way. The faculty has been wonderful throughout the years, and has really contributed significantly to judicial education for the states.

So the National Judicial College is primarily for state judges?

It is. And principally state trial judges.

And how is a judge selected to go to the school?

Well, the application is made. Most of the states will fund the education program for their judges. There are a few judges who have to pay their way, but generally it is funded

by the states involved. There are a limited number in a class, but they're able to take care of I think most all the applicants.

And what sort of classes are offered?

Well, classes in evidence, case management, criminal law, injunctions. All the sorts of things that a trial judge is going encounter, jury selection, that kind of thing.

So, correct me if I'm wrong. Is the emphasis then on procedural matters, rather than specific laws, because the laws would vary from state to state?

Both. They do have substantive law sessions too, particularly in areas that are complex, like criminal law is going to be somewhat the same everywhere, property law and so forth, and then the graduate courses take specialized areas that the person may be particularly interested in and wants to re-attend. They have a lot of judges who've returned. Some of them return to teach after that.

That leads to my next question. Who's on the faculty? Who makes up the faculty? Is it other judges? Is it law professors?

There are a core of faculty and administration and then there are a large number of judges who devote their time gratis teaching these courses. A lot of them have become federal judges since, and we still have a few federal judges that come back and teach at the college. Judge [James] Burns from Oregon is one. He comes every year.

It sounds like a great experience. When the course of study is complete is there some sort of certification or degree or something like that?

There is a certificate that is given, and they have a little ceremony, a graduation kind of ceremony. They usually have a speaker of some note. I think it's made known that if you don't come to all the classes and do your homework, you're not going to get your certificate, so if you go back to your state without a certificate, it's not going to look good. It doesn't really happen, but the fact of the matter is, as I mentioned, there's a real *esprit de corps* for those judges that come out and really dig in and work.

Do you think this is leading towards a kind of standardization of judicial practice throughout the states?

No, but I think what it does is help all of the judges to realize the most effective methods of handling things, and, also, that initial course is an awfully good course to break someone in to being a judge that has been an attorney. There's quite a little difference, and it bridges that gap.

I'll want to, later on, explore your own transition from private practice to the bench. I want to stay a little bit more with your experience with the Board of Regents, and you were talking before about one of the achievements while you were on the Board of Regents was the establishment of the community college system. Could you briefly describe your particular involvement in that?

We really worked for that, very hard as a board, and my involvement was being very much in favor of it and in encouraging Governor Laxalt to proceed with it. Then my later involvement was after we did get the funding from the legislature. Oh, and, also, I appeared before the legislature in testifying for it. Then, after we got the funds in setting

up the mechanism for how it was going to be administered, we had a president of the community college system that reported to the Board of Regents and then that president would, in turn, be responsible for all of the community colleges throughout the state. And, of course, there would be individual presidents of the campuses, but he was the president of the system. We set that up, and I had a significant hand in working all that out.

Structurally, the Board of Regents had how many members? Do you recall at the time?

Yes, we had nine when I was initially on it but it was later expanded to eleven.

And obviously they were elected, but were they elected by county or is the state divided into some sort of legislative districts?

When I first ran, it was divided into districts. There were three regents from Washoe County. Reno is in Washoe County. And there were three from Las Vegas. That's Clark County. And there were three from the remainder of the state. And they ran countywide initially. So the three of us would run in Washoe County, but the terms were somewhat staggered, and I'm not sure why it was that we had two run at one time because the third one came up at a later time, but in any event, that's the way it worked out.

And it sounds like the regents, or at least the districts, were chosen on the basis of population. Is that right?

Yes. When the one-man/one-vote rule became necessary as a result of the Supreme Court ruling, then the regents were divided into smaller districts. There would be several, three districts in Washoe County, three in Las Vegas, and three throughout the state. There would be eastern Nevada, western Nevada, and so forth. Then there was a further redistricting because of the fact that the population had increased so much in Las Vegas; and that's when the regents in Washoe County were limited to two and two throughout the remainder of the state and the rest in Las Vegas because the population is so large.

Right. And continues to grow.

Yes.

In addition to having served on the Board of Regents for the University of Nevada, you were also active on the Board of Directors on the National Association of College and University Attorneys. Is that right?

Yes.

Tell me about that.

Well, it happened that they were going to form an organization nationwide of university attorneys, and we did have a representative from the attorney general's office that advised the university periodically. What the board thought of was, since I was an attorney that I should go as well. So the two of us went, and we were charter members of this organization. At that time, lots of the universities didn't really have their own attorneys. There didn't seem to be that many legal problems. Later, it developed that there became lots of legal problems, but at that time there were not as many. So, it was an organization to exchange notes and experiences and to learn from what other universities were experiencing. It became a very fortunate thing, very swiftly, because that's when all of the campus

difficulties stirred up during the Vietnam War, like the Mario Savio leadership with Berkeley. We were in contact with the university attorney there, and we were learning from the experiences that other campuses were having with demonstrations, breaking in the buildings, damage problems, and exactly how to deal with it; and yet how to preserve the free speech rights of the students, the demonstrators, and the faculty. So that was a very valuable thing for the next couple of years to have these sessions. We would have educational sessions about dealing with that kind of a problem, particularly the Vietnam kind of problems. There was also a racial problem at that time too and it kind of combined. This was the time of the Black Panthers and that sort of thing so we were having to advise our own colleges and universities as to how to proceed with these two very difficult situations.

Well it sounds like this was a challenging time.

It was.

Were there demonstrations opposing the Vietnam War on the campuses here in Reno and Las Vegas?

Yes. Particularly at Reno. They had an incident that created a real problem for quite a little while. There were demonstrations periodically, mostly ones that focused on the Vietnam War problem. There was an annual event that the university here in Reno had been putting on for years. They called it Governor's Day for the ROTC. It was to award the special honors to those students who had earned them and to recognize the ROTC, and, of course, lots of these people were going to be going on to Vietnam. And there were counter demonstrations, as I recall, for two years, but at a different part of the campus, and they were students who opposed the war and who wanted to make this known. So, that worked out fairly well with the football stadium where they would have the Governor's Day Award for the military, and then another part of the campus where they had the demonstrations for those who were very much opposed to the war.

That worked well until one year, and it was the same year as Kent State occurred [in 1970]. It was about five days after the shooting of students at Kent State. One of the professors, Professor Adamian, who was with the group that was demonstrating in the other area of the campus, got them stirred up to leave and march up and show them at the Governor's Day celebration at the stadium.

So there were about three or four hundred students in there and a number of faculty, and they were marching up in that direction and it was about the time that there was a motorcade carrying the governor and others and there was a real danger they were going to start rocking the cars and so forth. They did, one of the students, with Adamian's encouragement, laid down in front of the car, and you could just see what could happen by some accident taking place there. And that was serious. I know I went over and talked to one of the very responsible faculty persons, Jim Hulse, who was with them and opposed the war, as many did.

As a matter of fact, by that time, I was opposed to the war too. That didn't mean that we were out of the war. The ROTC people were obligated to go there. That was what our country had directed them to do. But anyway, I spoke to him and I said, "You know we've got a real problem coming here. It could blow up" and so we had agreed that rather than hold them out at the gates some way that if they would go in and march around

the field three times and out that that would show their feeling about the war and their counter-demonstration and would avoid a controversy. Well, it seemed like a good idea, and maybe it wasn't a good idea. It seemed like a good idea.

Professor Adamian, instead, led them up into the stands, kind of like a cheerleader, and then he proceeded to disrupt the ceremony. And then the most frightening part about it was when he said, "Let's go out onto the field." The ROTC were drilling out there with fixed bayonets and these students that he led out onto the field were very close to them, and what was the horror in my mind is that it just took somebody tipping a hat, and we could have another Kent State kind of operation on our hands right there. A lot of this was on TV and, of course, the community was wildly upset so we insisted disciplinary proceedings begin against Professor Adamian.

Well, a very complicated structure that had been adopted by many universities that the American Association of University Professors had sponsored, which was that a hearing was held before a group of professors, and then it would go to the president and then the board. The community was a little upset with the time it took, but that was our procedure and that's what we had to do. The committee recommended that Professor Adamian receive disciplinary action, but not be terminated. The president agreed. The board did not agree and terminated him. But during the course of this time there were lots of meetings where students demonstrated in front of the board and were championing Professor Adamian, and some of the professors were too. But we as a board felt it was essential to hold the line, and we felt that it was the responsibility of the faculty to prevent this kind of incident that had happened at Kent State and happened at other universities where professors were actually leading to irresponsible action. It was more than just an expression of opinion, so he was terminated. He had been just very recently granted tenure. And he filed suit and actually Charlie Springer was his attorney that had filed the suit for him. Summary judgment was granted by Judge Foley for him, which would reinstate him, and I think compensate him fifty thousand dollars back pay.

That was appealed and the Ninth Circuit Court of Appeals reversed that, and then it came back for a trial. The trial was held. Judge [Howard B.] Turrentine came in from [the Southern District of] California and tried the case. Bruce Thompson had recused himself because he had been a member of the Board of Regents some years before, and so Judge Turrentine came in and tried it. He affirmed the university position that it was appropriate to terminate him and so ruled against Adamian. Some number of us were witnesses. I was a witness. It was a very unpleasant experience, all of this.

Then that decision was appealed to the Ninth Circuit Court of Appeals. About that time, I was appointed to the Ninth Circuit Court of Appeals. This created a problem. It was about the first year I was there, I think. And so the judges on the Ninth Circuit Court of Appeals recused themselves, and they brought in judges from the Tenth Circuit to hear the case, and the district court decision that Adamian was properly terminated was affirmed. I would say the Adamian incident took at least ten years winding its way.

Good heavens. It doesn't sound like a pleasant experience at all, and it dragged on for so long. You mentioned that originally a separate area had been set-aside on campus at Reno

for anti-war demonstrations that would take place simultaneously with the Governor's Day celebration.

Yes.

Was that your idea to set up a special free speech area or do you know how that came about?

I don't know. I suspect it wasn't my idea. I thought it was a very good idea, but I believe it was the president of the university's idea.

I see. Well, because it did involve the ROTC and you yourself had been part of that same ROTC unit.

I had at an earlier stage, way back when.

You must have had mixed feelings about all of this.

Yes. I did, because I could understand why the country calls on you to represent your country in the military, the same way when I felt I was obligated to go at the time of the Korean War. So I could see exactly that it's very important, the ROTC program. And yet I had mixed feelings with part of it. I did agree at that time with the students that the war was a terrible mistake, and we should be getting out of it as quickly as we could. I wouldn't say that I was among the first to arrive at that conclusion. I was probably about in the middle of those who realized it was a bad mistake.

An interesting point in connection with that was when the Bay of Tonkin occurred, and President Johnson said we must now go in and send in our troops and fight this battle. There was a Professor Erling Skorpin, who was a philosophy professor, and he gave a speech that was widely reported in the press saying, "We don't know what really occurred in Vietnam, and we should be questioning this, and before we get deeply involved, we should find out if this is a justified action," and elaborated to some extent in that vein. Well, at that point, the community was very upset. We had all kinds of calls about this Erling Skorpin. He's got to be fired because he's opposing the President of the United States and a military decision and this kind of thing you can't sustain. That was the time of the John Birch Society, and we got many critical letters.

Dr. Skorpin then gave a speech before the Alumni Association, and I went up to hear it, and he made a lot of sense, but my own view, at that time, was this man is expressing his opinion, but he was obviously wrong but, [laughter] I thought, that's the important thing in our United States is the ability to express dissenting opinions, and you know sometimes those dissenting opinions turn out to be right. But my view was then we have to protect this man's freedom of speech, although he's obviously dead wrong. [laughter] And I think a lot of us felt that way. We upheld his right to speak, and we got all kinds of heat from a lot of people in the community at that time. But I've just thought since, what a wonderful lesson that is in our First Amendment free speech rights. The kind of things John Stuart Mill talked about, the importance of dissent, because Dr. Skorpin was right. He was exactly right. And he was a very unpopular man for it. But he stood up for what he believed, and he was exactly right. I've always carried that in the back of my mind. Some day I'd like to talk to him about it. He then left a couple of years later and went to one of the Montana schools, I believe. But it wasn't because he

was forced out. He had another opportunity. But that's a good lesson for all of us.

Yes it is. If the First Amendment doesn't protect unpopular views, then it seems to me that the whole notion of freedom of speech is fairly hollow.

That's right.

That is a good lesson. You mentioned at this time too, in addition to a lot of organized and unorganized opposition to the Vietnam War while you served on the Board of Regents and as university attorney, this is also a time of racial tension and racial unrest. Are there any incidents that you recall from this period?

Yes. There was one particular incident. There was a football player, Jesse Satwite. He was a big guy. He was a lineman. And he was charged with going in and intimidating a professor for grades. I believe, if I recall correctly, I think it was the grades for his girlfriend, not his own grades. But he was shouting, and he was a big kind of imposing guy, and so there was a disciplinary procedure at that time, and I'm sure there still is, through a student court and then any final decision can be appealed to the Board of Regents.

Well, the student court disciplined him in some fashion. I've forgotten exactly what, but I think it wasn't severe, it wasn't anything like he had to leave the campus or anything, but I think it was something to the effect that maybe his grade would be reduced or maybe he was suspended for awhile from the team, I've forgotten exactly what, but it was then appealed to the Board of Regents.

This became quite a celebrated case among the black community in Reno, and when the board met, we had a very large audience who felt that perhaps he was being unfairly dealt with by virtue of the fact of his race. So we heard it and reviewed it. I was chairman at this time. Also, the Adamian thing was while I was chairman. Both of those two wore me out. I believe that the black community felt that we had treated him unfairly. I think we sustained some minor disciplinary thing. I think part of it was that he was so large and that the professor felt more intimated perhaps than he might have been if he were a smaller person. But anyway, some minor disciplinary action was sustained, and people seemed to be relatively happy with it. We also had a lot of those meetings like that with a large group....

One of the things that did occur out of that Adamian situation was that I certainly realized that we needed a revised disciplinary procedural code. The real problem was that the type of conduct that was expected of professors and students was not well defined and that really led to all of the legal problems. Actually, I drafted a new code, and it eventually was adopted by the board. It made a lot clearer the kind of activities that were acceptable and not acceptable.

That's good.

And some revised procedures applied that didn't take so long and get everyone so upset.

Well, it's nice to know some good came out of all this aggravation. So, your appointment as university attorney was simultaneous with being the deputy attorney general?

Yes.

7

Nevada Telephone Company

I recall, in looking at my notes here, that part of this period you also served as vice president of the Nevada Telephone Company.

Yes.

Can you tell us a little bit about that experience?

Sure. That was a fascinating experience. This little telephone company served central Nevada, and it was started at the time of the big mining boom in Tonopah and Goldfield. And at that time, Tonopah and Goldfield was the population center of the state. The phone company was formed by people who were, at that time, leaders of the community and the state. There were two persons who became United States Senators, one a governor, one a member of the House of Representatives, and another became the financial magnet of the state, George Wingfield, who owned most of the banks at that time. So it was a pretty prestigious group, a very able group, that formed this company to serve the telephone needs. Telephones were reasonably new, and so they served Tonopah, Goldfield, Manhattan, Bullfrog, Rhyolite, and a lot of these little communities that were building up were boomtowns. One of the communities that was designated in the original service authorization from the state was, in addition to the large towns of Tonopah and Goldfield, was the town of Reno, but nobody paid much attention to that at the time. [laughter]

Then, the way I became involved, was my grandfather worked as a bookkeeper at that firm, and over the years he bought stock in it. In those boomtown areas, things would go up and down very swiftly, you know, and there would be a gold mine discovered, and then it would be mined out, and then something else would happen, and so forth, but he had confidence in it. He gradually bought the majority control of the stock. This was after a lot of the original founders had left, and were not so interested in the telephone company. Senator Pittman went on to the Senate, [Tasker] Oddie became the governor, and later a senator and, of course, it was a minor thing to George Wingfield.

They were just wanting to get the telephone company going. The Nevada Telephone and Telegraph Company was formed in 1905, and I think he bought or had the majority of the stock probably in about 1915, if I recall correctly; and it did well for awhile and then the area came on very hard times, and the company kind of wound down to a very small operation, a few phones. Then, World War II came along, and all of a sudden, they put a big airbase down there.

So, in the meantime, my grandfather had moved to Reno with my grandmother, who was also an officer of the company, then and later on for a number of years. Actually, she took quite an interest in it during all the twenties, thirties and forties. She was president. But anyway, it was a small operation, and the local people were kind of running it and my grandfather would go down periodically to see how everything was going. Then, when this airbase came, things boomed up, so they moved back to live in Tonopah during the war. But when the war ended, in true Tonopah style, most everybody left, and places folded up, Tonopah was back on hard times again. Goldfield was very small.

At the time that I graduated from law school in 1958, my grandmother wanted to sell the stock, and somebody had said they would buy it for ten thousand. I said, "Geez, I don't think you want to sell it." She said, "Well, there's nobody here to run it or take an interest in it." Of course, my father was the superintendent of the schools here, he didn't have the time, and I thought, this is a neat thing. Sure, well, let's see about it. About that time, somebody came by from an organization called Kellogg Switchboard and Supply. Later it was absorbed by IT&T, but it provided telephone equipment to telephone companies.

It turned out that the government wanted to locate a radar station as part of what they called the "sage system," a semiautomatic ground control system. It was a series of radar stations throughout the whole country, and it was designed to be able to cover with radar any incoming planes, because at that time that was the threat not missiles. And there was one going to be located in the Tonopah area. Well, the local manager, Edith Van Alstine, said there is no way they could build a telephone building on a mountain and furnish the very complex communications equipment for that radar site, and so they tentatively had turned it back over to Bell. This happened right about that time and this fellow from Kellogg Switchboard and Supply came through and said, "You people are nuts. This is a great thing to have. It will rehabilitate your own phone company, and we'll help you, and we'll help you finance it, we'll help train your people. This is wonderful." I talked to my grandmother. She was enthused to have somebody do something with the company, because it had been a big part of their lives. And so I said, "Yes, sure, let's look into it."

So, very shortly after I got out of law school, this fellow from Kellogg Switchboard and Supply said, "We'll fly you back to Chicago, you and your wife, red carpet on United Airlines." They had a red carpet service, and actually rolled out a red carpet. And we thought this was a neat thing anyway, because for one thing, we were very broke, and it was wonderful to be able to go back to Chicago, and they were going to pay our way on the plane. We went back and, of course, they were willing to finance. We had to raise some additional capital. They would finance. It was a large loan at that time, it was five hundred thousand dollars, and then they would train our people, because our people were five little old lady operators and a seventy-two year old

maintenance man that climbed the poles to fix the wires. [laughter] So we went back, and got all enthused. The big worry that Barbara and I had, I remember, was we weren't sure they had agreed to pay the hotel bill. They put us up at the Palace Hotel and it looked like a pretty expensive hotel. They were bringing in these silver platters to serve us, and we thought, if they haven't agreed to pay for the hotel bill, we're in big trouble. [laughter] But they did. They picked it up. I was happy about that.

So, we embarked on this project and did borrow the money and did hire Kellogg to install all the communications equipment, built a big building up on a mountain. It was about five hundred thousand dollars worth of telephone equipment to service this radar site, and we had a ten-year contract with the government to provide this service. It could be terminated in less than that time, but they would pay for the unused depreciation of the building. We hired two people we had known from Hawthorne, Nevada, to be trained. Both of them were firemen, and we got two high school students from Tonopah, and trained them and that became our maintenance force, and they did a very good job. One of the persons who was a fireman, Howard Smith, later became general manager down there, and so we had this contract with the government that was helping to really rehabilitate the phone system. At that time, there were still only old crank phones throughout the community.

Oh really?

Yes. We had two hundred fifty of them, as I recall. We had fifty phones in Goldfield, and I think two in Manhattan. [laughter] Rhyolite and Bullfrog had long disappeared. [laughter] But anyway, we got going on that, and a few years later, we were able to, I think two years later, get an REA loan, because we now had a kind of a solid base, to be able to convert our crank phones to dial, and we did.

And REA, excuse me for interrupting, but REA stands for?

Rural Electrification Administration, but it also finances phones. For rural areas you have to particularly qualify, and there are two percent loans that help to subsidize rural phone service. In fact, REA did a wonderful subsidization throughout the whole United States over the years with both power and telephones with these loans to do so. So that enabled us to do that. It was kind of a joint effort. Barbara was very much involved. She was on the board of directors, my grandmother was on the board of directors, and my father and I, and so it was really fun. My father was made president, and my grandmother was the secretary. Barbara and I were on the board; I was vice president. It actually was quite a lot of work, because we had to put all these contracts and things together, and there were a lot of things happening. One of the things that happened was that after about eight years, all of a sudden on Good Friday, we got a call that said, "By the way, we're terminating the government contract", which they had a right to do, "on Monday." So this cut the income of the company in half just within three days.

Oh my.

And that caused some rigorous readjustments. But then we were able to engage in a cost-settlement arrangement with Bell Telephone Company. It was in a way that assisted rural communities that had to provide essentially the same kind of equipment as a large company to be on the toll network. They had a cost-settlement program, whereby Bell

would subsidize a rural telephone company's costs for toll service for what they actually were, but then Bell got the toll revenue that was generated. That worked very well. That was a great impetus in a lot of ways, like the REA in providing the same kind of phone service in rural communities that large cities had. That was a wonderful program, and it worked very well and it was a salvation to our company after the government terminated the contract. When I went on the bench in 1977, I could no longer be a vice president and director and so my wife, Barbara, took over as vice president and took an active role in managing the company. She did an excellent job. My son, Procter IV, became quite involved in the company and was very helpful with legal matters.

Is the family still involved in the telephone company?

No, we sold it about six years ago. It was kind of hard to do because it had been in the family for over seventy years, but things were changing so much in the industry. We would have kept it actually, if things had stayed somewhat the same. But with the competition from MCI and Sprint, and AT&T breaking up and no longer willing to be part of this cost settlement, sharing of costs program, where the other companies were not. That was going to create, we thought, some real financial strain. Right now it would be very hard for a small company such as ours to be competing with what is now the new telephone system. I am very pleased we sold, except for the fact that it was an awful lot of fun.

I see. Well, it's certainly a piece of your family history, but it seems to me it's kind of an interesting piece of Nevada history as well.

It is really. The minute book of the company of stockholders and board of directors is just fascinating to see the characters who were involved and what they did, knowing what they later became. One of the things we did was to trace down all of the old stockholders, because they had kind of gotten lost. A lot of them had gotten lost, because the company wasn't in essence worth anything. But we found some of them. They were very interesting people. One person who took us a long time to find was a mining engineer. He had become the president of International Mining Association somewhere in the past.

That's interesting. So what became of those early minute books?

Well, we had to turn them over to the buyers of the company, but I kept copies of it all.

Oh good. Good.

And now they have lost the original books, and I'm sorry that they made us turn them over.

Oh, that's a shame. I think the state historical society would be very interested in that material. That's too bad.

Well, they may find them yet, some time yet, but they're in some warehouse somewhere.

Was it a big concern when they took over the company?

It was. It was. And then they merged, in turn, with another company, and the one that is now in is Altel, which is a large independent.

8

Woodburn, Forman, Wedge, Blakey, Folsom & Hug

After the firm you were in, McKissick and Springer, broke up, you then went to work for another firm. Is that right?

Yes. Woodburn, Forman, Wedge, Blakey and Folsom. When they had contacted me, I said, "I'd be happy to join, but I want my name on the firm." Because I'd been with Springer, McKissick & Hug and I didn't want to get too lost. So they were a little bit concerned about that because it made a lot of names. And I said, "Well, it's a very short name." So it became Woodburn, Forman, Wedge, Blakey, Folsom & Hug.

How did you come to be associated with these people?

Well, Virgil Wedge came to talk to me, and asked if I would like to join up with their firm, and he asked me at a time that I was going crazy trying, with Roger Newton, to manage the practice that we had, which was a very busy practice at that time. It seemed rather appealing to me. McKissick was gone, and Springer went to the attorney general's office. I think at that time I said I would join their firm after Springer had finished being attorney general, so that I wouldn't just abandon ship. So when he left the attorney general's office, he came back to practice with Roger Newton. I left to join the Woodburn firm. I'm not sure why they were interested in me. I had tried cases against one of their partners, Gordon Thompson, and I tried cases that Dick Blakey was involved in. Maybe they thought that I did all right.

Must have liked your style. And I guess you'd had some dealings with Mr. Woodburn, right?

[laughter] That's right, and with Virgil Wedge, with democratic politics. But that was never mentioned. [laughter]

[laughter] They never brought that up?

I certainly wasn't going to bring it up.

[laughter] Now when you were in practice with the other firm you were doing criminal

defense, and you were doing some personal injury, handling divorce cases. What sorts of cases did you have with this new firm?

Well, it was, again, quite a general practice. I think I still did some criminal defense because we were required to take appointments from the federal court. So, I still did some of that for maybe the next couple of years and, but I did general business law, utility law, because I was involved with the phone company, and some other utility law, and represented some insurance defense and also some plaintiffs' work. I tried a couple of cases, representing the Southern Pacific on crossing accidents. They were hard clients to represent, because they didn't want to put those gates on some of the intersections, so when the crash would occur the suit was against the Southern Pacific for not having gates and relying on the whistle on the engines. Tough cases. I had one interesting case that involved the Carson Irrigation District and the Southern Pacific and an engineer on the Southern Pacific who brought an FELA case. What had happened is the base of the tracks had gotten flooded out, and when the engine hit it, it overturned. Ralph Baber, who was the engineer, was injured and so he brought this case, FELA is somewhat like Workmen's Compensation litigation. But what was fascinating was that it involved the Carson Irrigation District as an additional defendant.

Was it their water?

It was their water. And it was their ditch and that's what we were litigating for was whether it was their fault. They let their ditch overflow, let too much water out and it ate away at the base. We also had a countersuit against the Carson Irrigation District for the damage to the locomotive. We tried that case, and it was really an interesting case. We won the case, and the Carson Irrigation District was held liable both for the engineer's injuries and for the damage to the locomotive.

That must have hurt them. Were there large damages assessed?

Yes, there were. Those kinds of damages weren't as huge as now. At that time, they were large.

Must have been more money than Mr. Caldwell was involved in, right? Mr. Caldwell, that was a lawsuit of about fifty-three thousand.

Yes, right. I suspect so. I've kind of forgotten what the amount was. I think Ralph Baber got about twenty-five thousand dollars. I forget what the damages to the locomotive were.

I recall earlier you were telling us about some of the judges that you appeared before and you mentioned a Judge Gabrielli. Am I pronouncing that correctly?

Yes. Gabrielli.

Gabrielli. Would this be a good time to ask you about a case you argued before him?

Sure. That really was a fascinating case.

Why don't you continue, Judge.

Well, the case I'm thinking of was the administration of the estate of Lavere Redfield. Lavere Redfield was a noted character from this area, in that he was very wealthy, but you would never know it from the attire he wore or the manner in which he conducted his

business. He would appear at execution sales, bankruptcy sales, foreclosures of mortgage. He would carry along a little brown paper sack. That sack was always full of cash.

So, he bought a whole lot of things at these execution sales. He had made his money by selling his stock just before the 1929 crash and buying a lot of real estate. He was almost kind of a Silas Marner character. He was really a miser, except for the fact that he liked to gamble, and he did gamble. He'd gamble ten thousand dollars at a time. I remember one time my son and I were building a playhouse for my daughters, and it was a holiday, and we needed some more wood, so the only lumber yard that was open on a holiday was one that was owned by Redfield. We went out, we got the plywood, and this little old man came out to help us load it on the truck with his coveralls and everything, and I told my son, "You wouldn't believe that's the richest man in town, would you." [laughter] And it was. It was Lavere Redfield. He was there running his lumber company. He had a stone house on the corner of Mount Rose and Plumas. It was a two story duplex and the bottom story was just like the top story.

It was always kind of a formidable looking house, sort of a fortress-looking house. We later learned that the bathrooms on the lower level quit working so he and his wife, both in their seventies, would go up to the second floor to use the bathroom. Nobody else lived in the duplex. The bathrooms never got fixed. It cost too much money to get a plumber. He was a fascinating person in a lot of respects. He owned about fifty thousand acres of land on the Reno side of the Sierras, going clear over to Verdi. It was kind of up to the top of those mountains before you went over to Lake Tahoe. He had bought these acres way back when, in those days after 1929, he paid something like a dollar an acre. It is beautiful mountain land. It was sort of checkerboard within sections of the National Forest.

Another principal asset of his was stored away in his basement. He had four hundred thousand mint-condition silver dollars hidden in his basement that he had bought from the mints. He had built a false wall up out of boxes of fake coins that he had bought. I think it was a Shell Oil program, Coins of the Confederacy or something. Anyway, there were boxes. He bought up all the rest of them after their promotion was up, and he used these boxes and stacked them one on top of the other with just a little hole at the top. And he'd climb up, go through that hole, and climb down the other side. He had a counting machine over there, and he'd keep track of these silver dollars. He also had a kind of a unique burglar alarm system. He had set a bunch of Coke bottles along the stairs so that if anyone came down in the dark, he would hear all this crashing of bottles. He had been robbed one time of another collection of silver dollars, and he made sure it wasn't going to happen again.

When the estate was to be probated, there was a lot of other property around town, and some bank accounts, in addition to the fifty thousand acres of land and these four hundred thousand silver dollars. I guess his total estate, as I recall, was something like eighty million. He had left a little page-and-a-half will, handwritten, in which he had designated his wife and two other women to be the executors of his estate. Then the next bizarre thing that happened was there were several other wills, only one of which was significant, that turned up, supposedly written in his handwriting too, but they were able to establish that they were forgeries. However, that held things up for probably two or three months until we got that established. It's kind of like the Howard Hughes' wills, which were

fascinating too. I went down and was involved in that. Ask me about that later.

I will.

In Redfield's case, there was really one principal forged will that was submitted, and it had named different executors and so forth but anyway we established that was a forgery. The genuine will created three ladies to be executors of his estate. Each hired an attorney. I represented Candid Larena, who was one of them, Luanna Miles was another person, and then the third was Nell Redfield, his wife. That created somewhat of a problem, in that, we all had to get along. It started out, the attorney for Nell Redfield was not very pleased to have two other executrixes involved. It kind of muddied the water, and so we kind of started out fairly antagonistic to each other. Redfield left one-half to his wife and one-half to a niece in Idaho. An attorney was also appointed to represent the niece, so now there were four of us to all get along. And Jerry Smith, who became Nell Redfield's attorney, had engaged a man by the name of Ken Walker, who was at Merchant's Bank in Southern California, to assist with some of the financial matters. So, what we finally did was establish a periodic meeting. I served as chairman, and, as I recall, we met once a month. It was almost like a board of directors' meeting. It would last all day, and we would decide what we were going to do with the estate. Finally, we all decided we were going to have to get along together. We did, and we administered the estate.

Judge Gabrielli, who you were first asking about, was the judge who was responsible for this, it was in his court that the administration took place, and he did a wonderful job. I think he contributed to us getting along. The incident I am particularly thinking of that he did so well in was, at the time we were going to sell the four hundred thousand silver dollars Redfield had stored in his basement, because cash was needed. We had estate taxes to pay for, plus the fact, Mrs. Redfield didn't want to keep the silver dollars, nor did the niece, so we decided to sell them. Well, if we just put it out in a normal way, advertising for sale, a lot of the value of the coins could well disappear, because a lot of them had numismatic value, not just the value of the silver. If it wasn't handled in the correct way, it was going to greatly diminish the value of these coins, so one approach that Mrs. Redfield's attorney was very much in favor of, was to get an appraiser to come in from New York, a well-known reputable person who would appraise the coins, then we would know their value and maybe could deal with one person. This was one approach, I didn't agree with it, but one approach was if we know what the value is, then if a purchaser was willing to agree to buy them for the appraised value, then we'd know that we got a good price. One bidder bid the appraised price of $1,500,000. Well, we went over to the court and that was argued. A couple of us argued that we didn't think that was a very good way to just deal with one buyer, however, that was approved by the court.

Then lo and behold, another buyer said that sight unseen, he'd be willing to bid a half a million dollars more than the price. It had been approved already, but here's this person who's willing to pay another one-half million dollars sight unseen. Nobody had seen the coins except the appraiser, by the way. Well, we put them in a bank vault downstairs. I went down to look at them, because I just wanted to see what four hundred thousand coins looked like. Then we went back to court. What are we going to do now? Judge Gabrielli said wisely, "We're going to open it up for bidding in court." And so then a third bidder

came in, and this was really getting interesting because originally they had been appraised for a million and a half, and so we had another half million dollars offered. It was the oddest bidding I've ever seen take place. "We'll now open it for bidding," Judge Gabrielli said. "I bid two million." Another one said, "I'll give you two million one hundred thousand." And it went up a hundred thousand dollars a pop to four and a half million dollars.

Wow.

Yes. And the other buyer ran out of money at the crucial time and couldn't bid any more so the original buyer bought it for four and a half million. But now he was very upset because he already previously had them for one and a half million. He said, "This is a breach of contract. I'm willing to bid this, but I want to preserve my position to argue the million and a half." Judge Gabrielli said, "Well, I'm not going to take a conditional bid. It's either you're bidding four and a half million or you're not. Otherwise, we'll sell it to the one who bid four million four hundred thousand dollars." And so he asked them to go out, and they came back and decided it would be an unconditional bid. [laughter] I thought that was a very shrewd move on the part of Judge Gabrielli that he smoked that one out and in his very kindly, soft way, just wasn't going to put up with that. So those coins were sold for, ultimately, for four and a half million.

Another really fascinating thing, and there were many of them in this estate, was what do we do about the fifty thousand acres of land? We've got estate taxes to pay, four and a half million dollars is not enough. And how do we liquidate the land? I mean, open it up for a developer or whatever? Much of the land owned was every other section in the Toiyabe National Forest. The Forest Service was very anxious to acquire it to preserve the nature of the forest.

Bill Woodburn and I went back to talk to [U.S. Senator] Howard Cannon. I had written a memorandum where I thought that the Internal Revenue Service could agree that they would exchange the estate tax for an equivalent amount of land that would be turned over to the Forest Service that wanted the land very badly. And I thought it could be done. When we went back to the Internal Revenue Service, they got real nervous about it. I still think it could have been done that way, but they got very nervous about it, because this didn't go through the appropriation procedure, but we then embarked on a different approach to get a special statute passed through Congress to permit this, because it makes just eminent good sense. It would be a shame to turn all of this beautiful mountain forest land over to just be developed and carved up. If it became part of the National Forest, wouldn't everyone win? Senator Cannon was convinced that was a wonderful idea. So, he got a little short attachment to an appropriations bill that authorized the transfer to the Forest Service, at the appraised value of the land, such amount of the land as required to pay the estate taxes. That's what happened, and so really about ten thousand acres was transferred to the Forest Service. It became a part of the National Forest and preserved for future generations, so we were happy about that.

Are there other unusual aspects of this estate? I mean this is a very complicated probate, obviously, and a very unusual one, too.

Well, one of the complications that happened is that the appraiser who had been employed, then maintained that he had been deprived the opportunity to bid on the

coins. We said, "That's ridiculous. You're an appraiser you shouldn't be able to be bidding on what you're appraising." So he ended up filing a suit against Jerry Smith, who had been dealing with him. A very unfair suit, because he obviously had not made a commitment along that line, but it certainly made me think less of the appraiser. We took depositions of other people in that firm. It ended up they didn't prevail.

Then, there was another interesting thing; Redfield had had a stroke. He had been a person who would never sign an agreement or anything for anybody. You had to deal almost always orally with him, and he was very reluctant to ever sign anything. Well, someone had gone in, shortly before he died, and was in a weakened condition, had gotten him to sign a lease for a very cheap amount. It was for six thousand acres next to the ski resort on Mount Rose and Slide Mountain and was valuable land, and the lease provided that he turned this over in exchange for the revenue that would be derived from the ski lifts. Well, ski resorts don't make a lot of their money from the lifts themselves. They make it on the restaurants and shops, plus the fact that there was no guarantee that they were going to build it, so this land was, in essence, turned over for a very unfair amount, which was very unlike Redfield. He was a very shrewd businessman.

So, then we filed suit, and I tried it. That was the last case I tried before I went on the bench. We filed suit to set this lease aside for undue influence, and that was fascinating. It was about a one-page lease. It had been, in turn, sold to the operator of Slide Mountain Ski Resort. This sale took place with a hundred-page documentation, and so I had some fun with that in trying this case. The attorney, Mr. Gunn, who had operated Slide Mountain, was a prime witness, and I had some fun cross-examining him about his hundred-page document, but he was sure this one-page lease from Redfield was okay. It was a jury trial; the jury came back with a verdict for the Redfield Estate. The lease involved a six thousand acre area site. It was actually worth about six million dollars.

I understand you were also involved in another probate involving the Howard Hughes Estate. Can you tell us about that?

That's right. Howard Hughes left his estate in kind of a quandary, in that there were a great many wills that began appearing. The most famous one that was handwritten and a movie made about it was the Melvin Dummar will. Supposedly, Melvin Dummar had picked up Howard Hughes when he was on the highway, and had given him a ride, and Howard Hughes was so grateful that he named him in his will. And this will left the estate, which was, of course, exceedingly large, probably it was over a billion dollars. It left it in sixteenths to various organizations, and I think a sixteenth to Melvin, but then also to others. And one of the recipients was to be the University of Nevada, and that's how I got involved, because I was at that time representing the university, and so I went down to confer with those who were seeking to uphold that will. It looked like it was a pretty good exemplar of his writing, and it seemed like there was some possible merit to it. It had been examined by one handwriting expert who said that it was indeed his signature. Then, others were being brought in because there were those who believed that other wills were his, and there were also those who believed that he had left no will.

I went down then to speak to the persons who were in the clerk's office, and had talked to the various experts that had come

through. Our group named in the Dummar will hired a number of noted handwriting experts. They said that it was pretty clearly not his signature, although it was a fairly good forgery. One of the interesting things, just in talking with some of the clerk's people down there, was the relative technology used by the various handwriting experts. The one who had said that our will was valid, they said, "You know, he came in here a lot different than the others. The others came in with all this sophisticated equipment. He kind of came in with a magnifying glass and a bed lamp." [laughter] Although there were others that pursued it further, after I had examined the statements of the three nationally known handwriting experts, all of whom said it was not his signature, I was unwilling to pursue it any further on behalf of the university. I certainly would have liked to have seen them get a sixteenth, but in good faith, there was no basis for going ahead with that.

But it must have been interesting to be involved in it.

It was. I think there were eventually about twenty different wills that showed up. All sorts of people were wanting to try to establish a valid will.

It must have been difficult being on the bench and hearing these cases, hearing these different wills presented.

Yes. I think the courts really had to do some searching. Eventually, no will was upheld, and it was therefore distributed on the basis of intestate succession.

I'd forgotten that was the final disposition in that. You told us about a number of different cases that you've handled in private practice, including the Redfield Estate, Benny the Booster [laughter], any others you'd like to tell us about?

Well, let's see. One I know that was kind of amusing in a way. This was one I handled early in practice, and it was at the time they were going to hold the Winter Olympics at Squaw Valley, which is quite close to Reno, and Reno would be the city that would be hosting most of the visitors at least. The chamber of commerce was very anxious to erect a building that would be kind of the center for tickets and all that sort of thing and would be a chalet type of a structure. It was drawn up beautifully by the architects and the chamber of commerce. They wanted to put it in Powning Park, which is a plaza that had been dedicated many years before—probably fifty or sixty years before—to the city as a plaza. It was a fairly small park, with grass and trees, and there was a lot of resistance from persons who did not want a building in this area, and filed suit to stop it. But the Chamber of Commerce was very anxious to have it, and they employed me to defend the placement. It seemed to me it fit in very well with the site, and I thought it was a good idea, too. I believe some of the relatives of the original donor were involved, but there were others who were protesting that this was an improper use of this dedicated plaza.

Eventually, we had a hearing in the district court, and the court upheld this particular use of a plaza. It was kind of interesting to determine that, when something is dedicated as a plaza, what goes into a plaza. That was the issue, and the court found that buildings can go into a plaza. It wasn't dedicated as a park; it was a plaza. The case eventually went to our Nevada Supreme Court. I argued it, and the Nevada Supreme Court affirmed the district court. So, the structure that was shown quite beautifully on the drawing boards

was erected. Unfortunately, it didn't end up looking as beautiful as I had anticipated. For one thing, it had a very steep high roof with not an attractive roof covering. It wasn't shakes, like I thought it would be. I was very disappointed in the way it looked, and I thought, geez, this is something that I'm partly responsible for. What was the irony of it all was that the Springer, McKissick & Hug law office, was in the building right across the street, and we just left the office where we were on the third floor and moved to the first floor. My window on the first floor of that building looked right out at this ugly roof. [laughter] Our firm was feeling kind of bad about the whole thing, and we volunteered to pay for a different roof covering for that building, but they wouldn't take us up on it. They wanted to leave it the way it was. But that was maybe just desserts for me. [laughter]

What a story. Well, you had an interesting career handling lots of different types of cases as a private lawyer.

9

American Bar Association

One of the things that I was very heavily involved in was the American Bar Association.

Oh, I'd like to know about that.

I ran for the state delegate to the American Bar Association. Each state has one delegate to the House of Delegates, and then they also have other representatives of various bar associations that sit in the House of Delegates. And Nevada then had a state bar delegate as well. The advantage of being a state delegate was that the fifty state delegates nominated the officers of the American Bar Association, so it's a fairly powerful spot. I ran in a statewide bar election, and I was elected. One of the funny things about that, as I think about it, was that, at that time, the House of Delegates was made up of older people. They were pretty conservative, and there weren't many people that were, say, under fifty or sixty.

About when was this? What year?

I have to think back. It was about 1972, I'd say. I went back, and I was dressed in western attire with a sport coat, as I recall, it was kind of a green plaid sport coat, and I went into this sea of blue, grey, and black suits, and I stood out like a beacon in that house, I remember thinking, "there's this crazy westerner." But since that time, and during the time I was there, there was a lot of emphasis on getting younger people in, and the dress code changed considerably. But, I sure remember sitting there that first day thinking I am really out of place. [laughter] Barbara went with me to the meetings, and she toned down my attire. I was, later, elected to the Board of Governors of the American Bar Association, and I served there for two years. Actually, I was serving in that capacity, when I was appointed to go on the bench, and I think I finished out that year. Barbara and I both enjoyed the time with the Board of Governors. I left the bar position, I think, a little bit early in the final year, because I was finding, they were meeting as a board at that time, once a month for three days and it

was too much with my judicial work. They've since cut that down, but they had way too many meetings at that time.

That's a tremendous responsibility.

Yes, it really was too much.

And what was the function of the Board of Governors?

Board of Governors is the policymaking body of the American Bar Association—it sort of functions like a cabinet. It employs the executive personnel, does the hiring and firing, sets up the agenda for the House of Delegates. The House of Delegates is like the legislative body, in effect, and so the board handles really the affairs of the American Bar Association in between the two annual meetings of the House of Delegates.

Do you recall any significant issues that came before the House of Delegates while you served or before the Board of Governors?

One I can think of right away was lawyer advertising.

Oh, that's an important issue.

Yes.

There still seems to be controversy.

That's true, and the American Bar Association actually opposed that, but the Supreme Court in a case held that bar associations could not prevent advertising. Interestingly, one of the judges on our circuit, when he was an attorney, argued that case before the Supreme Court and won.

Who was that?

Judge Bill Canby.

Oh really? Down in Phoenix.

Yes. We were opposed, because we were thinking that it was not professional, and that it would lead to the used car kind of approach to law practice, and that there would be too much possibility of misleading the public. The argument on the other side, of course, is that it would open up the services to the general public on a more competitive basis, and that ultimately it would result in lower fees and better opportunities to choose lawyers. I don't know if that's really transpired or not, but I think the used car approach to lawyer advertising has come true, unfortunately.

Well, after twenty years or more, thereabouts anyway, of lawyer advertising, how do you feel about it now?

I think we were right the first time, when we thought that it did not lead to appropriate professionalism. There are arguments on the other side, but that's certainly my view.

Any other significant issues that you recall from this time?

One of things that we were trying very hard, in fact, I was on the committee to do so, was to bring younger people into the policymaking area of the ABA, such as through the committee structure and through the various sections of the ABA, to have it open to younger people. We were actively encouraging the young lawyers section and having a representative from the young lawyers section on our Board of Governors.

I'm trying to think of other issues at that time, and there were a couple of them. Each year there would be two or three controversial issues, and I might have to look back to remember. Offhand, that's the one I think of. I know during that time, we hosted judges from England at the 1776 bicentennial celebration, and that was quite successful, I thought. It turned out to be quite expensive. The bar association was having financial troubles for the next couple of years as a result, because a little too much was spent on entertaining the English judges.

Were there many women involved in the ABA at that time?

Initially, not many. And that was another thing that was beginning to open up too. There were very few women when I was first in the House of Delegates, and that has opened up a lot.

How about in practice here in Nevada while you were in private practice? Were there many women lawyers?

No, there were not. There were maybe four or five, if that many. Three or four, maybe.

Has that changed over time?

That has changed. That has changed considerably. When I was in law school there were only three women in my law school class. Now it's about fifty-fifty, and there are a lot of women now in practice, and that's been a very good thing. I think that women have done a good job. The old idea was that, well, a woman couldn't appropriately try a case. I remember hearing that a lot, and it just wasn't true. There are very capable women lawyers, both in trial and in appellate practice that I see. They do very well.

Well, learning a lot about your career, one of the things that strikes me is you seem to have been and maybe continue to be, an agent for change. Do you see yourself that way?

Yes, I do. I do. I think I have been an agent for change.

Do you think that is reflected in your work on the bench?

Yes, although, you know, on the bench you don't have as much of an opportunity to really change things policy-wise. You can change things in a way the court operates. For example, I was on the gender-bias task force that we had, and I thought that was a very good thing for us to take a look at how we, as judges and lawyers, were operating and whether unintentionally there was some bias against women. Indeed, it was shown that there was. There were just little things that would put a woman lawyer at a disadvantage that very well meaning judges and fellow attorneys would not be aware of. "Sure nice to see you here, honey. That's a beautiful dress." That would be the kind of thing that a judge would think, well, that would be very complimentary. But, in effect, it put the woman lawyer at a rather serious disadvantage, in that she was something less than her opponent.

10

The U.S. Court of Appeals for the Ninth Circuit

Let's shift gears a little bit here, and let me ask you again about how you came to be appointed to the Court of Appeals.

President Jimmy Carter had a different method of selecting appellate court judges. He did not want to have it done solely on the basis of recommendation of the senators involved, and so he established a commission in each of the circuits. In our circuit, it was an eleven-person commission I suspect that was probably true in the other ones too. The idea was for the commission to accept applications, and, in fact, I guess to promote applications and then to recommend to the president through the attorney general three to five persons that the commission felt would be good representatives on the court. That was done here. There were a number of persons who applied, and the commission held separate interviews with each of those persons who applied.

An interesting part about it, for me at least, was that the commission asked Judge Bruce Thompson for recommendations. He recommended two attorneys. One was Rex Jameson in Las Vegas, and the other was me. He sent a brief letter that said he had recommended us. He didn't say why or anything. I was quite flattered. I thought about it, and I thought, one, that I'd have to move to San Francisco, and that was not a very good situation at that time for my family, and, secondly, I also thought that the Chief Justice of the Nevada Supreme Court had it locked up, and that it was kind of hopeless and so I had decided not to apply. I wrote to Judge Thompson, thanking him very much, but that I thought that I would not apply. Rex Jameson called me and he said, "Are you going to apply?" I said, "No, I don't think I will." And I said, "Are you?" And he said, "Yes, I think I will." And I said, "Don't you think that the chief justice has it kind of locked up?" He said, "No. Well, you never can tell." Later I did decide to apply.

You thought the chief justice had it locked up? What did you mean by that?

Well, I think he had planned ahead for a couple of years at least, and I think he

had been in contact with Senator Cannon. He had kind of planned his life around the possibility of being able to do that. I thought that he would have a good strong inside track, because he thought about it a whole lot before and was the chief justice of the Nevada Supreme Court.

And who was this at the time?

Al Gunderson.

Al Gunderson. I see. And it was Judge Thompson, federal Judge Thompson, who recommended Rex Jameson and you?

Yes.

What happened next?

Well then, they scheduled individual interviews with each one of us. They interviewed us all separately, and I don't know exactly what happened in each interview. I do know what had happened that was adverse to Justice Gunderson. One of the members of the commission, one of the Nevada representatives, had, instead of simply getting letters of recommendation, thought the idea would be good to conduct a poll at the Nevada State Bar Convention, which was immediately before the interviews. It had distributed questionnaires to have the attorneys fill out what they thought about the judicial temperament and legal ability and so forth of all the various persons who had applied. Apparently, there was a lot of criticism of Justice Gunderson. Now, that's what I have heard. So, that affected adversely his application to the commission, and the commission did not recommend him. They recommended Nevada Supreme Court Justice John Mowbray, an attorney here in Reno, Spike Wilson, and me.

But initially you had been hesitant when you were recommended by Judge Thompson.

Yes.

What changed your mind?

Well, that's interesting. What started to change my mind was when Rex Jameson said he was going to apply, and I got to thinking about it, you know this is probably the one chance that I'd ever have. I didn't know how good of a chance I had; I thought because I had not ever been a judge that was maybe going to be a problem, not realizing that a lot of people are appointed to the circuit courts and, indeed, to the Supreme Court, without ever having been a judge before. I thought that was a handicap, and then I just thought, well, if I'm ever going to have a chance, this is it. I had really always wanted to be a judge. Then right about that time, I got a call from Judge Eugene Wright on the Ninth Circuit Court of Appeals, who I had never really met. That was a great shock to me. But he had been involved with the National Judicial College and, apparently, knew people who did know me and said he really hoped I'd apply. He said he didn't know if I knew, but that I did not have to move to San Francisco. And so that was a big item to me, so I decided to apply. Now, the time was very short, and I had my secretary up until three in the morning typing out the application to get it off, and Federal Expressed it in time to get it in. [laughter]

What transpired after the commission had these three recommendations? Then what happened?

Well, Justice Gunderson, understandably, was extremely disappointed. He felt that it had been unfair to him, and I think that he,

working with others, had a local newspaper in the south attacking the manner in which the commission had operated. It was never really done in his name, but he was doing it and, truthfully, I can understand it, because he planned so hard on it. As a matter of fact, when I applied, I called him, and told him I was applying, and he was very nice about it, but I think he thought for sure he would be one of the three nominees.

When you said, "the newspaper in the south" you meant the southern part of the state?

Yes. It was called *The Valley Times,* and they would publish articles and then they would be copied by all the other newspapers around the state and Reno and Las Vegas. *The Valley Times* stated that Spike Wilson had employed a public relations agent to get him well known with the commission, which was untrue. With regarded to Justice Mowbray, they were intimating that all his opinions were written by his clerks and had some articles about that. With regard to me, the attack was through "The Nevada Judges Association." The Nevada Judges Association was really composed of the justices of the peace of the state, not all of the judges in the state.

There are quite a few justices of the peace, right?

Yes, there are. That's right. At the end of their convention, I think it was in Ely or Elko, I forget which, when it came time for resolutions a lot of the justices had left when they passed a resolution that the commission should be redone, and no one should be appointed that didn't have judicial experience. That of course, was aimed at me. I had a call from a lot of the justices of the peace around the state saying, "Well, we weren't there. And we didn't mean this." Then it kind of all blew over.

The U.S. Attorney General has a big influence on the selections, I think they make the recommendations in that office to the president. Anyway, what ever happened, I was selected, and they did an FBI check and so forth. When I had my confirmation hearing, there was no opposition at all, and it was a very nice ceremony. I had brought my whole family back to Washington, D.C.; my wife, father and mother, and all my kids, and we all went back, and they watched the hearing. The hearing before the subcommittee, with Senator [Howard] Cannon was wonderful. He took it right away to the full committee, got the full committee to act on this, and took it to the floor of the Senate, so that I went through the subcommittee, the committee, and the floor of the Senate, all on the same day, and my family was there to watch. It was really interesting for them.

Oh that's fabulous.

Yes, it was. It was also arranged to have me sworn in the next morning at the White House. [laughter]

Talk about a speedy process. That's great. Who was the attorney general then? Was that Griffin Bell?

Yes.

And do you recall, was it Senator Cannon who chaired the hearing?

He didn't chair it, but he's the one that took me before the committee, and gave a nice introductory talk, as did Paul Laxalt, who was then back there as a Senator. Both of them were very generous in their remarks, and it was a very easy hearing.

It sailed right through.

It sailed right through, so I was sworn in by Vice President Fritz Mondale, with my family watching. He invited all of us to go from his office, where I was sworn in, to have coffee in another room in the White House. He sat around, and talked with us for about half an hour. It always amazed me, when he was a candidate for president that he didn't come across on TV better than he did, because he's an extremely witty person. I mean he was a very entertaining person to talk to, and he was very congenial. One of the things I remember when we first went down there, he said, "Well, you're on the court now. I bet they sure got some dog cases saved up for you." [laughter]

Well, I want to hear about some of those cases. But I'd like to know your evaluation of this process, the commission, of the hearing process and all that that went into your nomination and confirmation.

Obviously, I thought it was a wonderful process.

Couldn't be better.

No, I think the circuit commissions are a good process actually. I'm biased by it, of course, but I think it opens it up. It gives an opportunity for others, just than maybe one or two people who are put in charge of it, say, in the attorney general's office to make the selections. It really opens it up so that recommendations come more from the community.

But that's not the process that's currently in place, is it?

No, nobody else followed that afterward, just President Carter.

Do you think the law should be changed to establish a permanent commission?

Well, I don't think it should be made a requirement of the law, but I think it would be a good practice for the president to follow for the court of appeals. I really do. And an awful lot of senators do that now, in making their recommendations for district judges. The recommendation of the senator is given a great deal of weight for district judges. It's given a lot less weight for courts of appeals. The White House and the attorney general's office have a lot bigger hand in the initial selection there.

So you're sworn in by the vice president with your family there at the White House. It's very exciting. You come back to Nevada, and you get some dog cases.

Well, one of the things that was kind of a surprise was when I was sworn in, I didn't want to turn that opportunity down to be sworn in the White House. I had figured that I'd maybe have a few weeks or a month to wind up my practice, and turn things over to others in the firm, but now all of a sudden I was a judge the next day. It was a little bit of an imposition in the firm, in that, although I had been in the process of turning things over, but probably not as completely as I would have if I knew it was going to be the next day.

When I came back, and, I thought, well, now that I've been appointed to this lofty position that they would be waiting there with the chambers and staff and furniture and everything all ready to take me in, and they weren't ready at all. And they never are,

I find that's the truth of the matter. That for a while you're kind of having to sort of fend for yourself in getting yourself situated. There was a visitor's courtroom adjacent to Bruce Thompson's that was used by Judge [Roger] Foley when he came up to Reno. That's where they put me, but it was not going to be any kind of a permanent headquarters, because it wasn't really set up for it. So the General Services Administration came by, and said, "Well, we can arrange to have chambers built here in this federal building as soon as some of the agencies move out. The Internal Revenue Service is going to move out." And I said, "Well, good. When is that?" "Well, we don't really know. We're trying to locate leased space for them. Unless you'd like to move to leased space." I thought about that for a minute, and, I thought, you know, that's the answer, because I could be waiting for years. So, they arranged for leased space in an office building downtown and that worked out very well.

What building was that?

It was the Ryland Building, which was on the corner of Center and Ryland.

Not far from where we are now?

Very close. Yes.

So that first week or so on the job it was a matter of just getting organized?

Yes, it was. It was, and because I was isolated here, well, I ought to tell you another thing. When I was in the process of determining where I was going to be, I always figured I was going to be in Reno. But I did have an interesting call from then Judge Anthony Kennedy, who had his chambers located in Sacramento, and he called to welcome me to the court, and also mentioned that I didn't have to move to San Francisco.
He said, "It's just as well."
He said, "I'm here in Sacramento."
He said, "But, it's just as well because if you're around places like that people get to calling you 'Your honor' and everything, and pretty soon you get to believing it." [laughter] I always thought that was a good remark.

I hope he's maintained that attitude.

He really has. He's very approachable, very down-to-earth. Yes, it was interesting, but it was a big shock because I was here alone, and really nobody to actually, you know, show me the ropes. All of a sudden these boxes of paper started arriving, and I had my secretary, who had been with me for a long time in the law firm, but she didn't know anything about the court, nor did I. I didn't have any law clerks yet, but I got them fairly soon. But none of us were much in tune with how the court was operating, so for the first few months it was quite interesting. The other thing is that when I had moved over to the office building, one of the things they didn't have is any bookshelves for quite a long time, it seemed like, several months. No bookshelves around, and so we were serpentining the books on the floor. [laughter]

Who was your secretary at the time?

Mina Harris. She came with me from the law firm to the bench, and was with me for a total of twenty-four years.

Oh, that's great. That was a very important part of your workload.

Yes. My current secretary, Mary Smotony, has been with me for sixteen years.

You must be a good guy to work for. You keep loyal employees. What did you do? You didn't have judicial experience. Of course, you were an experienced litigator, but that's not the same thing as being on the bench. What did you do? How did you decide how to proceed?

I remember the first day I came to the office, and I couldn't even figure out how to work the phone. So, I went home at noon and I told Barbara, I said, "It's useless. It's just better for me to come home, because I don't know what all is happening, and I can't even work the phone." But the next day I felt better. [laughter] We just kind of started in. Actually, the members of the court were very helpful, and it was just the fact that they were away, but when I went around to talk to them, I got some good ideas. I went down to Judge Kennedy's chambers, and talked to him as to how he had his office set up, and then I went down and spent a few days in San Francisco, and went around to the various judges to get ideas of how to do it, and that all was very helpful. After I'd gone through all this, they suggested that maybe it would be a good thing to have a manual for new judges, so they thought that I'd be the one to whip up the new manual, which I did.

Well, good for you.

And I do think it did help other judges that came on.

I think that's important to have something like that. How long did it take you to get law clerks?

I think I had them in about two weeks.

Oh, really?

Yes. Actually Judge Kennedy was a big help to me because he had some people who he had interviewed before in selecting his law clerks. At that time, we had two law clerks. I selected one from McGeorge and the other graduated from UCLA.

And do you remember their names?

Yes. One is Greg Marshall and the other is Ron Peck.

And when did you first have calendar?

The first thing was I sat on an *en banc* case.

Oh really? Tell me about that.

It was *U.S. v. Loud Hawk* and it involved someone who was charged with transporting explosives, Loud Hawk was. He was a Native American, and the big issue was that the agents who had gotten the explosives had gone out and exploded some of it, but had not kept anything around much but the wrappers, and so the problem was that the defense wanted to see if this truly was explosive. They were entitled to examine the evidence, and the evidence had been destroyed so that was the big issue. And I remember thinking whether I should just sit there and shut up or whether I should ask some questions, and I thought, no I'm on the court. I'm going to ask some questions. So I did.

And in this en banc hearing—how many judges heard this appeal?

There were twelve at that time. The court had authorized judgeships of thirteen, I was

filling one vacancy, and there was still another vacancy that Judge Tang shortly thereafter filled about a month after.

And after hearing the oral arguments, what happened?

Well, then we had our conference, and they had a process that was a shock to me, that they have the most junior judge speak first and that was kind of a daunting thing to happen right at that moment, because here I was with judges that I really didn't know that well, and I was having to give my analysis of this case that I had just sat on, but it worked out all right. The judges were very kind.

Well that kind of leads to my other question. Was there kind of a period of being a freshman on the court, where obviously in this situation, that your most junior person goes first or are there other things like that?

Yes. There are. The seating is that way. Quite a lot of things are determined by seniority. As the newest person on the court, you vote first, and you speak first at the conference. I guess other than that really, other than the ceremonial aspect of things, it is not that great of difference. I mean you're kind of immediately accepted. I remember one of the things I should mention to you. When I first went in to meet the chief judge, who was then Judge Browning, I thought, this is probably an elderly gentlemen who will be rather severe, and so I went in to meet this enthusiastic, bright-eyed, very young looking man, and it was a big shock to see him as the chief judge. He was very kind. He wanted me very much to move to San Francisco. That was his big pitch at the time. He was trying to get all, as many of the judges as possible, to live in San Francisco.

He wasn't too successful with that?

No, no he wasn't. One of the other things that I remember about the initial time on the court was when I met Judge [Richard] Chambers, who was also very nice, and he had brought in a desk into my chambers in San Francisco that he had gotten from the Carson City federal courthouse when it closed, and it had been the desk for four different district judges in Nevada. It had a little plate on it that showed all the four district judges. I thought that was an awfully nice welcome to the court.

That is nice. What happened to that desk? Do you know?

I still use it in San Francisco.

Do you?

It's a very nice desk. Leather top, and yes it's a very nice desk. The other thing, as you no doubt know, Judge Chambers had a manner of speaking that was very hesitant and he had a manner of kind of looking at you with his eyes half closed, and then have this very hesitant manner of speaking. I wasn't sure if it was a speech impediment, or if it was a habit, so I fairly timidly asked Judge [Benjamin] Duniway when I was going around, just so I'd know, I said, "Is Judge Chambers' hesitant method of speaking, is that a speech impediment that he has or is it just a habit?" He said, "It's a weapon." [laughter]

And from what I've heard it was a very effective weapon at times.

That's right. Yes, it was, I think. He was a very unique individual, Judge Chambers, with a tremendous sense of humor.

Judge Chambers has a reputation of being quite an individual. Other reminiscences that you have of him?

He'd been on a committee to see what could be done about a bill that was impending called "The Nunn-DeConcini Bill" and the Nunn-DeConcini bill was to establish a national court to discipline judges who violated judicial conduct rules, and Judge Chambers called it the "Judicial Hazing Act." When I was appointed, he resigned from the committee, and had me appointed in his place, and so I went to some of the meetings. I thought that we couldn't, as a court, just say, "Well, no, we're not going to do this. We had to have some kind of an alternative that if we're not going to do this we should be doing something else. And we had talked about having it done in the judicial councils, and I thought this was a very good idea. Well, Judge Chambers, I don't think thought it was a very good idea and at the very first Ninth Circuit Judicial Conference I went to, this was brought up. He spoke from the floor, and when he spoke from the floor there was no hesitant speech. I mean he did very well, and he was criticizing this committee recommendation. It seemed to have a lot of my quotes in it. I would have rather been more anonymous. And he said what he was concerned about was that the committee was offering it in good faith. That seemed like an odd thing to say, but he said, "I'd like to illustrate that with a story about my father."

Then he related the story about his father who was opposed to having the city build a very expensive fountain in the town square. So what he did is he went around to the various churches, and he mentioned to the Mormon Church that it should be named the Brigham Young Fountain, and to the Methodist Church, the John Wesley Fountain would be an appropriate name, and the Martin Luther Fountain, the St. Augustine Fountain. As a result of the turmoil he created, the fountain was never built, and he said, "Now if that is the purpose of this committee recommendation, I'm all for it." [laughter]

Do you have any other stories about Judge Chambers?

I have one other one that always intrigued me. Judge Chambers and Judge Walter Ely were very close friends, and they kidded each other a lot. Both in person and at dinners, whenever Judge Chambers would call to Judge Ely's office and his secretary would say, "Well, he isn't in right now. He's over at the library studying Jeremy Bentham." Of course, Judge Chambers didn't believe a word of that. When Judge Chambers was over in London at London College, he noticed that they have in a glass case the body of Jeremy Bentham preserved. He went up, actually did, go up to the president and wanted to see what the procedure was, how they went about preserving Jeremy Bentham's body in this glass case, he said, because there is a very famous Texas judge in the western United States, and this would be very appropriate to put his body in a glass case in the courthouse in Pasadena. And I guess they were taking him seriously, and he went on and on with it. Some way or another, he got a postcard with this Jeremy Bentham in a glass case, and he superimposed Walter Ely's head on it and sent it out as a Christmas card. [laughter]

The other thing that was remarkable about him was getting the courthouse in Pasadena. First of all, they said it couldn't be done. The GSA wanted it in Los Angeles, he wanted it in Pasadena at what had been originally the Vista del Arroyo Hotel, and later became a hospital during World War II, and then it had

been allowed to just sit and deteriorate. And he thought it'd make a great courthouse, and he was pushing for it and GSA said, "No, it can't be done because that's not a designated place for the court to sit." Well, nothing like that stopped Judge Chambers. He arranged with the city that we could sit in the City Hall, and arranged for a place that we had offices in a savings and loan building when we went over there. One panel a month would go over, and conduct hearings in City Hall, so that solved that problem. There were many other problems that he was able to overcome, but the story I like was that he wrote to the regional director of the GSA, and said that they were holding the thirtieth year anniversary of the GSA allowing the building to deteriorate, and he would like to have the names and pictures of all the past directors so they could be appropriately recognized. The director wrote back and said, "You know, I don't have the names and pictures of all these directors." Judge Chambers wrote back and said, "That's fine. Just send me your picture." [laughter]

That's a great story. When you came onto the court, was Judge Chambers a senior judge at that point?

He was.

Did you ever sit on a panel with him?

Yes. A number of times.

What was he like on a panel?

At that time, the senior judge presided, and he would have a calling of the cases. Each of the attorneys for their case would stand up and say who he or she was representing and the argument time necessary. That ritual would consume about fifteen minutes and the first one would say, "Yes, I'm here and I think we're going to need our full thirty minutes." And Judge Chambers would say, "I can't imagine this is going to take thirty minutes. Don't you think you can do it in twenty?" Well, they maybe thought they could. And so as they kept standing up the time would get shorter and shorter. "Well, yes, I think seven minutes would be just fine." Then we would hear the cases. This was always kind of a source of frustration to me. After cramming everybody down to this time, then almost always Judge Chambers would take about fifteen or twenty minutes telling a story somewhere along the line. They were usually pretty funny stories, but I always thought that was not really a good thing from the standpoint of the way the attorneys must have felt. He would frequently pen out his dispositions on a yellow pad right on the bench when he was there. Very short.

What was he like in conference?

He was a very smart man, and he would express himself, but not try to bulldoze his opinion at all. He'd just say what he thought, and if he didn't agree with you, he'd write a very persuasive dissent. I remember well, because Judge [Warren] Ferguson, Judge Chambers, and I were on a panel, and Judge Ferguson felt very strongly one way and Judge Chambers didn't. It had to do with whether there was a reasonable suspicion to stop a van, and I was convinced by Judge Ferguson and so I wrote the opinion, and Judge Chambers wrote a dissent. When I got the dissent back I thought this sounds pretty good after all. But we went ahead and filed it that way. The Supreme Court unanimously reversed it. That was the first case I had that went to the Supreme Court, and it was right away starting off with a unanimous reversal. [laughter]

11

Preparing for Oral Argument, Conferences, and Opinion Writing

I'd like to ask you a little bit about panels and your own preparation. How do you go about preparing for a panel?

Well, I like to prepare in a concentrated time, shortly before argument. Other judges do it differently; everyone has their own way. Some do it the way I do; others do it early on. I like to do it like cramming for final exams in college, so that all of the facts are familiar to me, I don't have to go back again and again. I kind of set my schedule so that the earlier part of the time, in between calendars, I'm working on the dispositions from the past calendar, and then shortly before oral argument, like say, the week before, I really start preparing very hard for the calendar, and I spend a lot of time, nights there too, when I'm there in between cases. To me, that works best, because I feel like I'm really on top of the case, the five cases or six that we're arguing that day. Every judge does it a little differently, but that's the way I like to do it the best. And I like to go to argument with not having completely made up my mind. I like to keep it open. I don't like to have the judges confer ahead of time and say what points we think are significant or any of that. I like a free-flowing discussion, so that on the bench we're getting the judges asking the questions that they think are important. It just seems to me that is a more open process without foreclosing something before argument.

Are there some judges on the court who like to confer ahead of time?

That has not been a general practice, at all, but there have been suggestions that we do that. I'm not aware of any panels really that do that. I think everyone goes in fresh with their own preparation.

That's a very intensive work style, it sounds to me. What you do as preparation, almost immediately before you're going to hear the argument. Do you use your law clerks in this process?

Yes. I have my law clerks prepare my files in a particular way so that I have the briefs there, the bench memo there, all of the key cases, any statutes that are involved, and the opinion of the district court, all in a certain place in the file so that when I'm studying a case, I can turn quickly, say from the brief, to look at the statute that's involved or the key case. That's part of the reason I think that I prefer to prepare just before because the files are all prepared, and they're all set up so that I really can go through it intensely right there. I have everything I need right in that file. And I can just, like if I'm reading a brief, and I think there is a point that is really important, then I go to the key case or I go to the statute.

Is this a technique that someone showed you?

It kind of developed over a period of time.

It sounds like a good system.

It works well for me. And I have a booklet that I use that has all of the cases for the week in it, and I write on the front of a sheet for each case. I write a paragraph summarizing the case so that it brings the key facts to my mind and then I have another page there that I make additional notes about what I think are appropriate questions or things I want to know and then a page where I take notes from oral argument. And that's very helpful because it keeps me very organized. I have a table of contents at the beginning showing which judges are involved, which judge's chambers prepared the bench memo, and what the weight of the case is. I'll show it to you if you want.

Oh, I'd like to see that. So the preparation for calendar is a very intense experience.

Yes, it is.

When you're hearing a case, you're taking notes?

Yes.

At the oral argument and then at the end of the day, I guess, when the judges retire for conference?

Right.

How does that work when in the conference? How does that usually go?

That's the place for seniority. The most junior judge tells how he or she sees the case and then we express our views in order of seniority. It isn't that rigid, but that's generally what we do. When I'm presiding, I'll turn to the most junior judge, and I'll say, "How do you see the case?" or "These are the four issues, how do you see issue one?" something like that. Then we talk about it, and we maybe try to convince each other one way or another. An awful lot of discussion goes on while on the bench, with the help of the attorneys, during oral argument, and that's why I'm so very much for oral argument. I'm a big fan of oral argument because part of it is when a judge is asking a question to convince another judge sometimes it's been pretty thoroughly explored in the oral argument with the judges' questions. When we get to the conference on the cases, they are generally a lot shorter than I thought they would have been because it's been pretty well explored in oral argument, and by that time people have fairly firm views. Then after the conference, I'll dictate a memorandum of what we decided. Whoever is the presiding judge assigns who writes the

opinions. When the opinion is received by my office, the clerk who's been working with me on that case will review it and say that corresponds with what I was saying and then I'll review it. But I like to have the clerk look at it first. I always assign one clerk to every case to see if they see something before I look at it.

In writing opinions, how do you go about that?

I draft, from that conference, kind of an outline of what I want to do, and I have the clerk do the first draft and then I work from that. Sometimes I can use it and sometimes I can't. And sometimes I use quite a bit of it and sometimes I use just a little bit of it and write a lot of it myself.

Do you find yourself writing several drafts? I mean working from that first initial draft, do you then find yourself writing several of your own drafts?

Yes, on the difficult cases, yes. On the difficult cases, I find myself writing several, quite a few drafts.

Do you work in long hand?

I do that and dictation. Sometimes I'll write out an outline of those things I want to say and then dictate it, then from that draft, that will be a rough draft that will have to come back to me first and then I'll smooth that out and rearrange it and so forth. I'm sure that I probably will be like those who have gone to the computer, but I find the dictating works pretty well for me if I outline my thoughts and dictate it and then I get a draft back and they can type faster than I can.

In panels, do the senior judges still preside?

No, they no longer do. It's the senior active judge.

Oh, so you might have a judge who's taken senior status on a panel but they wouldn't necessarily be the presiding judge?

Right. But the senior active judge does preside. That, I guess, was your question?

Right. I imagine there are personalities—there are stronger personalities than others in the court. Are some people more persuasive than others in this court?

Yes. Maybe more forceful is the better way to say it. Sometimes persons can be very persuasive in the manner in which they've written things and not as persuasive orally. Each of the judges is very independent. They are independent thinkers, and I would say none of the judges goes along just to make someone else happy. They go along because they're convinced.

Of the judges who are no longer on the court, with whom you've sat with, I don't want to put you in the position of having to comment necessarily on people currently on the court, but are there people that you sat with on the court who stand out in your mind?

Yes. I thought that Charles Merrill was an ideal judge.

In what way?

If I were to model myself after one, he'd be a very good model. He was extremely fair. He was very polite to counsel. He had a very pleasant manner in presiding over oral argument and a very pleasant manner

in presiding at conference with the judges. He was an extremely bright person who thought through things very well and had virtually no prejudices that I could discern. He approached each case open-mindedly and reasoned his way through, and then he had this beautiful resonant voice. He just looked like a judge, and he, with this resonant voice, was kind of a commanding appearance, I thought. Actually, I replaced him when he took senior status. He was the Nevada judge that I was appointed to replace. He had been on the Nevada Supreme Court, too. I'd tried cases there in front of him.

And he passed away?

No, he's still alive.

He's still alive? He lives in the Bay area?

Yes, he does. He doesn't hear cases any more. He has some health problems that prevent him from doing so. But he's still a very likeable, jovial man. I saw him at Christmas. That was the last time I saw him.

12

The Circuit Split Controversy

One of the issues that has come up in the course of these interviews that we really haven't talked about is the efforts by some in the Congress to split the Ninth Circuit. I understand that you've been involved in testifying before Congress and representing the Ninth Circuit in these hearings. Is that right?

Actually, I have not testified before Congress, but I have been very heavily involved. During the past years, I think there have been four efforts to split the Ninth Circuit. In about 1978, there was an effort to split both the Ninth Circuit and the Fifth Circuit. The Fifth Circuit initially was not in favor of it. Later, the members of the bar and the judges all decided that was the wisest thing. The Ninth Circuit took a different tack, and it determined that a larger court could work well with an *en banc* court being less than all of the judges and by experimenting with administrative units. And so that was the first attempt to split the Ninth Circuit.

Since then, there have been several other attempts. None of them ever got past the Judiciary Committee of the Senate except this last one. And in the last situation, Senate Bill 956 was introduced to divide the Ninth Circuit by splitting off the five northern states. That would be Alaska, Washington, Oregon, Idaho, and Montana, and that didn't appear it was going to pass. That was the bill on which they had the hearings, several judges appeared. Judge Wallace appeared on behalf of our court because he was chief judge at that time, Judge O'Scannlain appeared. Judge O'Scannlain's approach was that he thought eventually the Ninth Circuit should be split, but that he didn't favor this split. He favored a split that would have divided California. That bill was not going to pass.

There was also a companion bill that had been drafted by Senator [Dianne] Feinstein and that was to create a commission to study the circuit structure throughout the country, not just the Ninth Circuit. That was voted on, and it failed by one vote to pass the committee. Then Senator Conrad Burns, who was managing this latest circuit split, along with Senator Slade Gordon from Washington,

decided on a different kind of split that might pass the committee. That was to add Nevada and Arizona to the five states, leaving only California and Hawaii as the Ninth Circuit, and the new circuit would be composed of the seven states. This was appealing to Arizona Senator Kyle because it was designated in the revised bill that the circuit headquarters would be in Phoenix, Arizona. That did pass the committee, barely and, at that time, it was thought that there would probably be some further opportunities to buy some time to address that particular split before it was voted on by the Senate. However, about the time I became chief judge, which was March 1st of this year, 1996, it seemed like it was developing a head of steam and might go forward and move in a few weeks so I appointed a committee to strategize this whole thing, as to how to handle it.

Who was on that committee?

Judge Browning, as the chairman, John Frank, an attorney from Phoenix, Judge Wiggins, Judge Schroeder, and me. We also had some staff who were assisting us.

Right.

Judge Browning and I went back to Washington, D.C., because we thought there was some urgency. At that time, when I first became chief judge, I sent out a letter to all the judges in our circuit, requesting them to send letters to all of their senators and quite a number of them did. I thought it was going to move quickly and that it's important to have the senators realize that the people on the Ninth Circuit are not in favor of this. Six bar associations had all voted to keep it the way it was, and we had three successive resolutions opposing the split passed at our annual Ninth Circuit Judicial Conference. They passed overwhelmingly to keep the circuit intact. I think about eighty to eighty-five percent voted for that. An overwhelming number of judges was opposed to the split and in favor of keeping it the way it was, so we thought it was important to get that message out. We also drafted a position paper, which we sent to all the senators, but we felt the personal contact was also very important and, as it turned out, it was. Judge Browning and I went around to probably twenty-five senators' offices and spoke to either the senator or the staff member that was involved with this. We got a great deal of help from Senator [Harry] Reid and Senator Feinstein. They were the two who were leading the fight against the split. We went to D.C., I believe on Monday, March 11, and we started meeting people during the course of that week. Thursday night, about 10:30, an amendment to the Bill 956 was introduced, which passed by unanimous consent to appoint a commission, as Senator Feinstein's bill had proposed. We were rather happy with that, except that we found out by the next morning there is a process in the Senate, whereby a secondary amendment is possible, and the secondary amendment does not require the unanimous consent. Senator Conrad Burns introduced the secondary amendment, which was to split the circuit as was originally proposed. The difficulty of it was that it was attached to the continuing appropriations bill, which shut down the government, so there was great urgency, and also there was no ability to filibuster.

When Judge Browning and I went back, we thought that if we were able to obtain enough commitments from senators, the bill would not have sixty votes. It takes sixty votes to end a filibuster, so the Senate generally does not proceed on a matter unless the proponents have sixty votes. We were

aiming for forty-one votes, and we felt pretty confident we had that because there were both Democrats and Republicans that had come to our point of view because it appeared to be an anti-environmental measure. A number of the senators, I think, had been pressed by some of their contributors, contending that liberal judges from California were making rulings on environmental laws that were adverse to business interests. A number of senators that were contacted also felt that they should not be dividing or restructuring a circuit based upon the decisions that particular judges had made at a particular time in history. The problem was that in this procedural posture, the bill could no longer be filibustered, so we were then looking at, what, in effect, was only a majority vote would be required for the bill to pass the Senate. Senator Reid and Senator Feinstein were most upset by this use of the unanimous consent process because a lot of legislation is done in that fashion. They felt this was, in effect, a trick, which it was. They expressed the opinion of the Democratic leadership, "Look if this is going to be the way that procedure is used, there aren't going to be any more unanimous consents.

That, in turn, was a concern to the Republican leadership as well. So much really takes that kind of a process to get things done. Because the leadership of both parties were concerned that this was an abuse of the unanimous consent process, pressure was put on Senator Burns to amend the bill so as to, instead, substitute the creation of the commission to study the structure of the circuits nationwide. We were very happy about it. That is now where it stands. It's in the House. It's in the House Judiciary Committee, and the subcommittee is headed by Congressman [Carlos] Morehead.

Oh, from Glendale.

Yes. And that at this stage of the game nothing further has happened. There are an awful lot of things going on with Congress and whether they'll get to that or not, I don't know.

Well, I guess this is a lesson in the byzantine rules of the Senate, isn't it?

Yes, it certainly was. It was quite an operation. We stayed over the weekend until that compromise was in place.

You mentioned that part of the motivation—the suspected motivation of the sponsors of the bill—was their opposition to environmental decisions that the court might have made in the past. Turning the issue around, what would you say are the arguments for keeping the circuit whole, as it is presently constituted?

First of all, it works very well. I think that it's better to have an approach whereby circuits can be larger without having a greater number of small circuits. Because this would create a problem for the Supreme Court and result in splits of the circuits on cases more than there are now. But even more important than that, is the fact that there really is a significant importance to being able to resolve the federal law within the nine-state area, Guam, and the Mariana Islands, so that we have consistent law throughout that entire area. It does take a little more time and effort on our part to do that because we have to be aware of panel decisions that might be inconsistent. We have taken a lot of steps over the years and developed a process to assure that we don't have conflicts. We have a process of issue identification, so that panels are aware of similar cases that are before other panels. Decisions that have just been rendered are brought immediately to our attention. The first

panel that has a particular issue has priority to decide it so maybe another panel will wait for it. The administration of the circuit adds some real pluses. One is the fact that we can have a circuit executive's office with a larger staff that is able to assist with employment problems and technical equipment problems. Another advantage is the fact that we can transfer judges, bankruptcy judges, and district judges, from areas that, for one reason or other, have a lesser caseload to an impacted area. Sometimes in an area, we have vacancies that have not been filled for a long time or there has been large growth since the last district judge or bankruptcy judge was approved. We have a lot of cooperation within our circuit in transferring judges, senior judges, as well as active judges. One time, Hawaii, because it hadn't had an appointment in the longest period, had vacancies there, and we were sending judges to Hawaii to help. As it happens now, Hawaii has a lesser caseload per judge and so some of the Hawaii judges come over to help with Nevada, Arizona, and Idaho, and other areas that have some caseload problems. And that has been a very valuable thing.

An additional advantage is one that other circuits don't recognize, and that is that there's a real strength in diversity among the circuit judges, both geographical, as well as background. For example, if a panel is composed of a judge from Arizona, Alaska, and Idaho, there is a learning experience because each judge has a slightly different perspective. You just might see something differently than you did otherwise. I have certainly found it to be a strength over the years to have had the experience with a variety of judges.

Well, what do you say to the argument that if you had a smaller circuit, then the judges would be more responsive to the geography in which they reside. That is to say, if you had a circuit that was Montana, Washington, and Idaho, for example, wouldn't the judges in Montana be more responsive to the wishes of the people in Montana?

Yes, that's the very reason why I think that we shouldn't have a circuit split. We're interpreting federal law that applies to the whole nation. There shouldn't be a different federal law for Montana than there is for Hawaii or Alabama or New York. We're interpreting federal law and it should be consistent. We're certainly making it consistent within the nine western states. We should not have one rule of admiralty for California and another for Alaska and another for Hawaii. We've got to have a rule that applies to all.

Well that's sort of a basic tenant that you learn in law school, isn't it?

Yes.

Someone has suggested that perhaps a fund ought to be started to send Senator Burns to law school. [laughter] I won't ask you to comment on that. Well, if there is one federal law, would you say then that there isn't a Ninth Circuit jurisprudence or judicial philosophy that would characterize the Ninth Circuit?

I think that what happens is that the Ninth Circuit gets some very interesting cases throughout its nine western states and interpreting those cases sometimes provides a new rule of law. But basically, if we haven't ruled on an issue, we look very carefully at what other circuits have done. We don't always agree, nor do other circuits necessarily agree with what we do, but we certainly do review that precedent and are hesitant to disagree with any of them unless we see strong reasons to do so, and sometimes there are.

13

Significant Cases

I want to ask you about some of the more significant cases that you have heard while you've been on the court of appeals. Do any, in particular, come to mind?

I think that I've written perhaps about four hundred fifty opinions since I've been with the court.

And how many years is that?

Eighteen years. And those are published opinions. I guess the total cases are about twelve hundred to thirteen hundred. I think that two cases, in addition to those we earlier discussed, that come to my mind are procedural cases, which were important from the standpoint of the manner in which the law is administered. One case was *Matter of McLinn*. That involved a situation where we're interpreting state law. We used to have a doctrine that was followed throughout the other circuits that gave special deference in the interpretation of state law to a district judge who was sitting in that state. That always struck me as being very awkward because the interpretation of state law is really what the appellate court should be doing, apart from deference to the interpretation of the trial judge, just as is done with the interpretation of federal law. To give deference to the interpretation of state law by the judge who happens to be sitting in the state seems to be in an *ad hominem* way to arrive at the law, and not a very accurate way either, because the district judge may not have experience in that area of the law yet and may not have been especially familiar with it.

This case was the perfect case for discussing that problem. It was a boating accident involving Alaska state law, and the district judge in Alaska had ruled one way in interpreting Alaska law. Our circuit panel that heard the appeal included Judge [Robert] Boochever, who had been on the Alaska Supreme Court for several years before he was appointed to the federal court and had a lot of experience with Alaska law. He wrote the panel opinion and deferred to the district judge's interpretation of Alaska law, but he

said he would have decided it the other way if he were interpreting Alaska law, without that deference. The case was then taken *en banc* and the decision was very close. It was six-to-five. Judge [Mary] Schroeder was to write the majority opinion, which affirmed our existing law, and I was to write the dissent. I wrote the dissent, and I convinced one other judge to go along with me so it just switched around with Judge Schroeder writing the dissent. Her dissent was kind of interesting, as she attached all the pages of Westlaw where all the courts throughout the country had ruled the other way. Professor Charles Allen Wright got very interested, and he was, in effect, keeping score and letting Judge Schroeder and I know which law school reviews favored Judge Schroeder's position or Judge Hug's position. One of the law reviews had a one hundred page article on this question. Our case never got taken to the Supreme Court but another case from New England did, and the Supreme Court ruled in the manner in which I had, six-to-three. Judge Schroeder wrote a complementary note, saying that, "Now, the final vote is in," or something to that effect. But we had some fun with that case.

Can you explain who Professor Charles Allen Wright is?

Yes. I should have. Professor Charles Allen Wright is a very noted law professor at the University of Texas who has written a multi-volume work on federal procedure. He's now, by the way, the president of the American Law Institute.

Since then state law has been decided with a different procedure. [laughter]

Well, I'm glad you set them right. Especially those courts in New England. Those people need to be set right every now and then by the westerners. What other cases come to mind when you think back about significant cases in which you've been involved?

There was another one that was kind of like this. It was a very recent case. It's *United States v. Gaudin*. That was a question in perjury cases or cases where persons are charged with making false statements to a federal official. The question was whether the statement was "material," as opposed to just an unimportant misstatement. Whether it was material or not was always viewed as a question of law. It seemed to me this was a jury question. A district judge in our circuit had written a very good opinion, saying that this did not make sense in light of some of the Supreme Court's more recent rulings that all elements of a crime have to be determined by the jury. It was very hard to see how this was not an element of crime. And yet, it was being determined by the court.

Do you recall who the district judge was who recalled the opinion?

Yes: Eugene Lynch. *United States v. Taylor* was his opinion. It was excellent. And he said that he realized all the other circuits in the country ruled the other way, but that it was time we saw that the emperor had no clothes. But anyway, that issue came to the panel of our court with Judge [Clifford] Wallace, Judge [Pamela] Rymer, and me. I wrote the opinion that materiality was an element of the crime and a jury question. The case was then taken *en banc*. We had a very interesting discussion. It was a six-to-five majority, and I wrote the majority opinion affirming the panel decision. Judge [Alex] Kozinski wrote the dissent. Judge Kozinski's dissent was very much like Judge Schroeder's, in that he wrote three solid pages of all the other circuits that had ruled the

other way. He stated in his dissent that "courts of appeals' opinions frequently raise waves on the waters of the law. Today's opinion is more akin to a tsunami." *Certiorari* was taken by the Supreme Court on that case. Justice [Antonin] Scalia wrote the opinion, and the court unanimously affirmed my opinion. It is interesting that right about that time there had been a projected tsunami in Hawaii, a huge tidal wave.

Oh, a real one.

It was developing toward the Island of Hawaii. There was great concern for Kauai. All of a sudden the wind shifted, and the tidal wave never reached Kauai. So I wrote to Judge Kozinski and I said, "This could be known as a 'Kozinski tsunami.'" [laughter]

Did he write back?

He did; he was a very good sport about it.

Are there other cases involving changes in federal procedure that you've been involved in?

There was a case that has an interesting story behind it. These cases probably are not great civil rights cases, but they do have interesting stories. The other one was a case that was a labor case. I was on a panel with, then, Judge [Anthony] Kennedy, when he was still on our court. Right about the time I'd written the opinion, and he had written the dissent, he was elevated to the Supreme Court, and the Supreme Court took this case on *certiorari*. [laughter] It seemed like a sure reversal to me. Justice Kennedy recused himself so only eight justices sat on the case. When the opinion of the court was announced, he sent me a copy of the opinion, writing on it, "You were not affirmed by a full court but it was a unanimous one. May it always be so." [laughter] I thought that was very classy. It couldn't be a full court because he was recused and there were only eight justices ruling on it.

That's nice. Well, I know that he was very helpful to you when you first came on the court here.

Yes, he was.

And I guess you've kept up that relationship over time.

Yes, we have.

Do you recall the name of that case?

Yes, I think it was *Linn v. Amalgamated Brotherhood*.

Are there other areas of law in which you've written decisions that stand out in your mind?

There was a case, *DeWitt v. Wilson*. It was a three-judge panel, and I sat with two district judges, Judge Garcia and Judge Burell, and it was reviewing the redistricting of the California election districts. It was a very difficult case because at the time they did the redistricting, they were trying to apply the statute, voting statute, which had indicated that race should be taken into account in redistricting. California was trying to apply that. The legislature couldn't agree on how to do it so the Supreme Court appointed some judicial masters. It appointed three state judges to be masters. They developed this redistricting with real careful study, I thought. They did take race into account. After their decision, the Supreme Court in the *Shaw* case declared the consideration of

race in particular circumstances in Louisiana to be unconstitutional. It was a question of applying the *Shaw* case to what these masters had done, not knowing about the *Shaw* case. Well, it just happened they did a very good job. It was a very difficult opinion to write, because fitting the masters in with what had previously been all right but now was quite a change in Justice [Sandra Day] O'Connor's *Shaw* opinion. But I felt, really, they had done the right thing because they had grouped, not only just for race but for other reasons, like community solidarity and other interests that are similar. The Supreme Court last year reversed another redistricting case from Louisiana. I didn't even know this case had been before them until I read a column, where the columnist noted that, "Well, it's true that the Supreme Court reversed a case involving Louisiana, but at the same time they affirmed in a summary opinion a California redistricting case." I looked it up and it was two sentences in a summary affirmance. I felt kind of happy about that. [laughter] I'm not sure why they didn't write an opinion on that case but, anyway, I was pleased that the opinion I worked very hard on was affirmed.

Well, I'm glad they affirmed your decision even though they ruled against the decision in the Louisiana case. The Shaw case has had significant impact I think, or ultimately will.

It has. Indeed, it has.

Do you want to comment a little bit about the Shaw case and then I'll ask you again some more about other cases you were involved in.

Well, I think it does have an impact and I think, really considering it in light of the fact that they did approve the California redistricting, I think the essence of it is that race can't be the primary factor of redistricting, and I think that the districts can't be structured in odd geographic patterns.

Gerrymandering.

Gerrymandering. I think that race, as a factor, can still be considered, and I think that's why they approved the California redistricting.

Other cases that have stories behind them?

Well, there was a case, an *en banc* case, *Olagues v. Russoniello*, in which there had been an investigation for voter fraud, allowing illegal immigrants to vote, and it involved the printing of ballots in certain languages. The plaintiffs contended it was improper and sought damages and injunctive relief. It was vigorously argued on both sides. Six judges ruled one way on the merits and four judges dissented on the merits. I dissented because I thought the case was moot. I thought the case was moot because the key factors were no longer in play. The significant part is that this was another one of these summary dispositions by the Supreme Court, holding that the case is moot. [laughter] I was kidding the court that "This is a one-judge victory." [laughter] You couldn't convince me, at the time, that this was not moot.

I've sat on some death penalty cases and those are all extremely hard. One was a Nevada case, *Schuman v. Wolff,* in which Schuman was sentenced to death, and I wrote an opinion that the mandatory sentence violated the United States Constitution. There was a recent case, *Mason v. Vasquez*. It was a California case, in which Mason did not want to appeal his denial of *habeas corpus*. He had an attorney who was representing him in this regard. Another attorney was appointed

to argue that he was not competent to make this decision. There was a competency hearing held before Judge [Ronald] Whyte. He did a very good job with it. When it came to us, it was a situation in which one attorney was arguing for Mr. Mason and the other attorney was also arguing for Mr. Mason. We held the man was competent. He knew exactly what he was doing. He committed the murder and did not want to continue to sit on death row. A very unusual case, and it was just a question of whether he was competent to discontinue his appellate process.

That is interesting. It raises the issue of death penalty cases in general. Perhaps you could talk a little bit about the Ninth Circuit procedure for handling death penalty cases.

The Supreme Court officially declared all death penalty statutes in the country unconstitutional in 1964. From that point on, the law was just beginning to develop, as to what death penalty statute would be constitutional. Two principal approaches were taken. Some states took the position just more particularly defining the crime that will be accorded the death penalty, whereas other states took the approach of defining aggravating and mitigating factors that should be considered by the jury. The reason why the Supreme Court had declared all the statutes unconstitutional is they said it was quixotic in the way it was applied. The jury was given little guidance, so they had great discretion in who got the death penalty, regardless of the nature of the crime. Well, eventually that was sorted out and the aggravating and mitigating factors kind of statute was approved and the other one disapproved. So it had to be individualized sentencing. That process had to be refined further in defining what aggravating and mitigating factors were. All of these matters had to be worked out so a lot of time was taken in the state courts ironing this out and then the state courts' decisions being appealed to the Supreme Court, then the Supreme Court reversing. There was a recent case in Montana where a man was on death row for fourteen years, but about seven of those were taken up by the state to the Supreme Court to be reversed again.

There was a case, Sorenson v. Secretary of the Treasury, *and if I can find my notes I could refresh your memory what that particular case is about, but maybe you recall it.*

I do. It had to do with an Internal Revenue Service policy of intercepting tax refunds to repay to the state the amounts the state had put out for child support payments that hadn't been made by the father. In other words, when the father didn't make the child support payments, the state would make some sort of welfare kind of payments, but they then could go back against the father for purposes of retrieving those support payments from the father. And what was involved there was the question of whether they could intercept both the tax refund money, normal tax refund money, and the income credit money, which are not taxes that have been overpaid but, instead, amounts that are paid to people who haven't had adequate earnings. Two other circuit courts had held that they could not, and a couple of other district courts had held that they could not.

The opinion I wrote held that these tax repayments were the same as any other repayment, and they could, in fact, reach those. If it was a community earning, they could only reach the one-half that pertained to the father's repayment. The lead plaintiff in that case was a woman named Sorenson and it was actually her earnings and her earned

income credit they were seeking to intercept to pay her husband's debt, but we held they could only intercept the one-half community property aspect of that. Probably the thing that was interesting about the case was the fact that the existing precedent in the country was to the contrary, and I believe the Supreme Court affirmed my opinion eight-to-one.

That's always reassuring, isn't it?

It is. It doesn't always happen, but it's reassuring.

I recall another, I found my notes here, another case, Chilicky v. Schweiker*, in which the Ninth Circuit reversed the district court, allowing an action for emotional distress caused by wrongful termination of social security disability benefits.*

Yes.

Do you remember this one?

Now that's one where the Supreme Court reversed the opinion that I wrote. I think it was five-to-four. But that was the situation in which a class of people in Arizona had had their disability payments reviewed. I think it was "Continuing Disability Review," they called it. And it had been reviewed under a policy that had been established by the Reagan administration to cut down on the disability payments, and there really had been messages sent out from Washington saying that there is a certain quota of the number of people that we should take off of these rolls. Most of these people had finally recovered the amount that was due them under the Social Security Act, but they had been wrongfully terminated for disability payments, but what they were seeking was damages against the individuals who had promulgated this policy of, in effect, a quota being cut off the rolls. In the opinion that I wrote, we held that they did have a cause of action, spoken of as a *Bivens* cause of action, and that's when a federal official has deprived individuals of their constitutional rights and are entitled to damages for that. The Supreme Court reversed, holding that when Congress had provided a mechanism for recovering the lost payments but had provided nothing else, that this was a congressional intent that there be no thing as a *Bivens* action in those cases.

Interesting and complex.

Yes, it is complex. I always felt it was a little unfair because these people were put to considerable hardship in not receiving those payments for a long period of time because, in effect, it had been held to be, truthfully, a very wrongful act on the part of the individuals that had instituted the policy. I thought they should have a constitutional right to recover. I still do.

Well, here's another case were the Supreme Court is wrong, I guess.

[laughter] That's right.

Another case that came to my attention was Portland Feminist Women's Health Center v. Advocates for Life*, from 1988, and this involved the creation of a free zone surrounding the clinic.*

That's right.

Can you explain your decision in this case? Or maybe you can give us some background on the case.

Well, what had happened was that there were a lot of protests that were going on by organized groups that were opposed to abortion throughout the country. This was part of it. This group had staged demonstrations in front of this clinic that was performing abortions. Of course, they're perfectly entitled to express their points of view, and the fact that they're opposed to abortion, the fact that they're opposed to this clinic performing abortions and opposed to the fact that women that are there seeking abortions are acting improperly. But what was wrong with it was that they were doing more than just expressing their views either with signs or verbally. What they were doing was kind of bumping the women that were going into the clinic and allowing a very small passageway for them to get through, making it very unpleasant physically for the persons to go in and really restraining them in lots of ways. And then there was also lots of loud shouting and chanting and screaming outside the window where medical procedures were being performed that were having an adverse effect on medical procedures. There had been a lot of difficulties there, and what the district court had done is enter an injunction that said that they had to keep a pathway of twenty-five feet in front of the clinic where these people could pass. The protesters were perfectly free to verbally say things on the way in and have signs and so forth, but what the district court was attempting to do was prevent those protesting from physically doing anything or from the loud shouting and chanting that was disruptive to the medical procedures that were involved.

Then, after the injunction had been entered, there had been some further violations of that injunction, and so what was contested in the appeal that we heard in Portland was both the validity of the injunction, whether it was too broad, whether it was an interference with free speech, and also whether the contempt citations had been correct. The whole courtroom was filled with people.

Oh, I imagine.

It was in the Pioneer Courthouse in Portland, with the little fireplace in back, and this was just filled with people and it was very emotional. One of the interesting incidents that occurred was that a person who had been one of the prime leaders was a minister, and before we started the oral argument, the attorney for the minister stood up and said that he had reached an individual settlement with the plaintiffs on this, so that he was no longer going to be held in contempt. Everyone was turning around looking at him, thinking that he had abandoned ship. That was a fascinating part of that case. We upheld the injunction and the contempt citations.

I think that case has set something of a precedent, hasn't it? Providing for free zones around other clinics?

Yes, it has.

Did the Supreme Court review that case?

It did not.

You were involved in another, at least one other, abortion rights case. National Abortion Federation v. Operation Rescue, from 1993, I think. Could you comment on that?

Yes. That again involved protests in front of a clinic that was performing abortions and

it was, again, part of this national organization, Operation Rescue. The technique that was being used was to select a particular clinic somewhere and bring a whole lot of people there that overwhelmed the local law enforcement authorities, because there would maybe be two thousand people in a place where the normal police force would not be equipped to deal on-the-spot with that many people. That was the technique, and the clinic had brought an action based on an old Civil War statute, the Klu Klux Klan Act. The part of the Act that was pertinent had two clauses: the first clause dealt with deprivation of the constitutional rights of an individual and the second clause they called the "Hindrance Clause," dealt with hindering the police force from protecting constitutional rights. And there had been a Supreme Court case that had interpreted the first clause just shortly before we heard this case, and it held that that clause of that Act, the first clause, was not designed to protect against private action. It was only designed to protect against state action, state authorities depriving someone of constitutional rights.

The second clause was not construed, and it was sent back to the circuit courts and, in turn, to the trial court, to take further evidence and further try that case because that issue had not been raised. Justice [Byron] White had resigned from the court, and there was a strong indication that the remaining justices were split 4-to-4 on the Hindrance Clause. The interpretation of the majority of our panel was that the Hindrance Clause was different. That it was designed to prevent groups from overwhelming the local law enforcement authorities so that they could not protect the constitutional rights of the people. Oddly enough, I was certain that the case would be heard by the Supreme Court. I mean I would have bet ten-to-one, because it was there to be resolved. In the meantime, Congress passed a statute, however that specifically dealt with demonstrations at abortion clinics. And so that has never reached the Supreme Court.

It basically rendered it moot.

Yes, it did.

Another interesting case, obviously as controversial as anything dealing with abortion, is the Compassion in Dying v. Washington. *Could you comment on that?*

As you say, that certainly is a controversial issue throughout the country on very divided views. I was with the majority in that *en banc* decision, in which we held that there was a constitutional privacy right to manage your own fate when a person was terminally ill.

It was a narrower case than a lot of people realize because it really involves persons who are terminally ill, and doctors who were treating persons who were terminally ill. An organization that was seeking only the right for those persons who are terminally ill, not the broader general suicide, usually it is spoken of as a suicide. But what it really amounts to is, people who only have a very limited time to live and are suffering and are desiring not to prolong their life for no purpose and to avoid a great deal of pain. There were some pretty poignant stories about persons whose pain couldn't be totally controlled with the morphine and even those whose can be controlled during parts of the time when the morphine wears off and have to get it started again have severe pain. It always struck me as odd that we spend so much worry and concern in executing someone as to whether they might have a minute or two of suffering, and yet we really almost sentence persons who are terminally ill to suffer as long as six months

with pain that can be controlled but not totally controlled. What, in effect, our opinion held was that there was a constitutional right to determine when you're terminally ill how long the agony is going to have to continue.

I hadn't thought about that distinction that you just made between a condemned prisoner and someone who is terminally ill with some terribly painful disease. That's interesting. Lots of difficult issues that you have to deal with.

There are very difficult issues. Now, of course, the big concern of the persons who view it differently is that it could be misused, that there might be a tendency to decide that some person's life was not worth living and to end it without their full consent or without them fully understanding what they were consenting to or that family members would want to be shed of the burden, that sort of thing. And those are valid concerns. In my view, that's a matter for regulation to assure that that is not the case, but that if the person is of sound mind and wants to not continue the suffering and to have a doctor be able to assist them.

Yes. This particular issue, of course, has been addressed by other societies besides the United States. I'm thinking of some of the European countries who have enacted "right to die" kinds of laws. In general, do you ever look to other countries, the laws of other countries to guide your thinking in deciding, maybe not this issue, but maybe other issues?

Yes. Well, we did in this issue, actually. And yes we do. Those are valid considerations to see what other societies have done.

Do you recall what other laws you were looking at for decisions in this case?

I don't offhand, no.

But you do look.

But we did look, yes. Historically and otherwise, yes.

A different kind of difficult issue is a case that in some respects comes very close to home here on the Ninth Circuit because it involved a judge in the Northern District of California, United States v. Aquilar, and I believe you were involved in reviewing that case. Can you comment a little about that?

Yes. I'd be happy to. That was a situation in which Judge [Robert] Aguilar had been charged with a number of offenses. The prosecution believed that he had been involved in trying to influence another district judge favorably toward a friend of a relative of his. He was acquitted of the more serious charge that he tried to influence the judge. He was convicted of two other offenses. One was the disclosure of a wiretap that he had knowledge of; the second was an obstruction of justice charge. When it arrived to our court, our initial panel had upheld the one charge, that is the charge on the disclosure of a wiretap, and had reversed on the obstruction of justice. The panel was Judges [Cynthia] Hall, [Diarmuid] O'Scannlain, and Hug. Judge Hall wrote the majority opinion. I wrote the dissent. I thought that it could not be upheld on either of the two charges. Judge O'Scannlain wrote a concurring and dissenting opinion, in which he held that it could be upheld on the wiretap charge but could not be upheld on the obstruction of justice charge. Then, actually all of us on the panel thought the case should be taken *en banc* to resolve the matter.

Oh really?

Yes.

Why is that?

Well, Judge Hall thought that I was wrong. I thought Judge Hall was wrong. [laughter] And Judge O'Scannlain was kind of in the middle.

Of two minds, right?

And so the *en banc* panel took it up, and the *en banc* panel held nine-to-two that both of the charges had to be reversed. I wrote the majority opinion, holding that the statutes just simply didn't pertain to the conduct that was alleged.

I guess I'll have to tell you a little background, this is kind of an interesting case actually. The genesis of Judge Aguilar's whole problem, really, was the fact that a fellow by the name of Chapman had enlisted his advice. And I should even go back further than that. Judge Aguilar, in reading through, I didn't know Judge Aguilar hardly at all, but in reading through the transcripts, which I read the whole trial and the prior trial, he was a person who had been raised by a mother and father who had been immigrant agricultural workers. They had five children. They grew up in a subterranean little apartment. The whole family had helped to support each other, some of them selling papers, and they all contributed it to the family support. And the community kind of helped each other there too because they were all poor. And his mother's best friend, her name is slipping me right now, but was a neighbor and some years later, way later, this fellow, Chapman, had married that person who was his mother's best friend. And so he would periodically come by and deliver sausages and cookies that the neighbor had prepared. He was known to Judge Aguilar and, as I looked at it, Judge Aguilar was not the kind of guy that could just say, "I'm busy, get lost." He was the kind of guy who felt an obligation to help people. He helped his Hispanic community, helped people get jobs; he'd done a lot of that, aside from being a judge. So when this guy came to him and said, "You know, I've got this friend named Tham, who used to be a union leader, and was sentenced and served his sentence and now he can't be a union leader any more, isn't there anything that can be done?" And Judge Aguilar said, and we as judges shouldn't give legal advice, but he did. But that sure happens. It's pretty hard to kiss somebody off when they've been part of your family or friends or prior client and said, "Yes," that he "should file an action."

This Chapman had been a part of the mob, and so he had been a bad guy, but he was eighty-three years old was the other thing. I mean he wasn't a current threat to anybody, but he had a bad criminal career and his friend was not an ideal person either. They brought by the petition to Judge Aguilar, and he said, "Yes it looks good." Well, Chapman, in order to impress his friend, kept saying, like in codes, "Yes, I've been to see the banker." He called him the banker. The FBI was intercepting Tham's phone, and so they were hearing all of this. They were thinking this looks really bad for a judge to be doing, because Chapman was indicating that Judge Aguilar was doing a lot, he would take care of this whole thing. Whereas, Judge Aguilar was probably thinking here's this guy I got to have him around. I'd get rid of him, but I'm not going to do anything other than tell him if asked to file a petition and maybe suggest appropriate procedure. That's at least the way I looked at it when I looked at his

background. The person he was supposed to have influenced, was Judge [Samuel] Weigel. And Judge Weigel said, "Absolutely not." They tried to get Judge Weigel to wear a wire, and he said, "I certainly won't." He testified that Judge Aguilar had done nothing to influence him. The only thing he had done was ask if there was an oral hearing scheduled. But that was not influence. So that's no doubt why the jury acquitted him of that charge.

The charge for the wiretap was based on several events. The FBI was concerned about Judge Aguilar's association with Chapman, and told Judge [Robert] Peckham this doesn't look good for the court. We don't know if Judge Aguilar knows if this guy had a criminal record. Judge Peckham was at an ABA meeting and thought he probably should warn Judge Aguilar, and he also was not aware of any kind of relationship, and he said, "You know the FBI tells me that you've been seen with this Abie Chapman and you know, he was a person that years ago that I prosecuted when I was a prosecutor. His name had come up in connection with a wiretap." That's all he said about the wiretap. His name came up in connection with a wiretap.

Well, that wiretap that he mentioned had expired. This was in August. In February, Judge Aguilar answered the door and here was Chapman, and he was delivering sausages or cookies in a box. He invited him in, and Chapman wanted a drink, and he gave him a drink. When he was leaving the house, and backing out he almost ran into two cars. Judge Aguilar, when he was standing on the steps, he saw a man over there taking pictures. Then he began to be worried that they may be thinking something's going on between Chapman and me, especially delivering a box of something or other. He began to worry about this. He called his nephew, told his nephew that Chapman was going on to his sister's house and to warn him that he'd better watch his driving, that he almost ran into two cars and not to call him anymore; that he had heard at work that phones were being tapped. That was essentially the warning that he gave to his nephew, Steve, to give to Chapman, which Steve did give to Chapman that formed the basis for that charge.

Our *en banc* opinion reversed the conviction on both the obstruction of justice conviction and the wiretap conviction. We held on the wiretap conviction that a defendant couldn't be convicted of disclosing a wiretap that had expired six months before. The Supreme Court affirmed on the basis of the obstruction of justice, and they reversed on the basis of the wiretap. They said that the intent of the statute was that it could be based on a wiretap that had expired. Then it was remanded back to us because in our *en banc* opinion we had not found it necessary to reach the issue of whether the knowledge instruction given was erroneous. The trial judge was a very good judge, Judge [Louis] Bechtle, who had been brought in from the east coast. But he gave an instruction that really didn't correctly state the law as to what knowledge was required in order to violate the wiretap statute.

So we had another *en banc*. Our *en banc* case again, and this time we ruled ten-to-one, that this instruction was improper, and if the conviction couldn't be upheld, it could be retried, of course, but it couldn't be upheld. Well, during the process of determining whether to seek *certiorari* to the Supreme Court and whether to seek a retrial and whether Judge Aguilar would resign from the bench, an agreement was reached between the prosecution and Judge Aguilar that they'd call a halt, and he would resign from the bench and that they would not prosecute or retry that charge. At that time, he had fulfilled

the age and service requirements so that in resigning he did not lose his lifetime annuity benefits. A long and tortuous history of a case.

Yes, indeed. It sounds to me like you question whether there was ever criminal intent there.

You know, in looking through the whole transcript of that, yes, I really did. I thought that, I was just seeing a man who had grown up in that way helping other people, how he got involved, unwisely, very unwisely, to get involved with Chapman, but I could see how it happened and my own thought about the wiretap was that he wasn't trying to tell Chapman to warn him. He was trying to tell Chapman, "Stay away from me and don't call me because I think they might be tapping my phone." Now that wouldn't be a crime, certainly when you tell somebody, "Don't call me cause I'm afraid my phone is tapped." And that wouldn't be a crime. If I were really to say what I think happened, that's what I think, when he stood out on that porch, he's thinking, you know, I think maybe they're after me, and they might be tapping my phone. They weren't.

Kind of a sad, sad story really in many ways, isn't it?

Yes, it is. It's a very sad story. It's an indication to me how a judge inadvertently can get into trouble.

Eternal vigilance.

Yes, that's right.

I think that we agreed that we wanted to talk about some of the more significant or more memorable cases that you have written opinions on between about 1997 and 2007. One of the first cases I'd like to ask you about involved environmental law. It was Friends of Pinto Creek v. United States Environmental Protection Agency, a recent case from 2007. I think you sat on this case with Judge Tashima and Judge Gould. Can you tell me the circumstances of this case?

Yes. That was a situation in which one of the defendants had wanted to set up a copper mine in Arizona, near a creek that goes by there. It actually is spoken of as a large creek, a small river. The problem that was encountered and the reason why the Friends of Pinto Creek filed the action is that the creek is endangered because it has too much copper now going into the creek and had been designated by the state, which is accepted by the federal government, that it is a polluted creek in that respect. So this would be adding more copper to a already polluted creek. The copper company responds that "we are going to decrease the amount of copper at a site up above there that would lessen the amount of copper that would come into the creek." It still wouldn't bring the creek into compliance and what our opinion says is that the design that the Clean Water Act and the regulations that have been adopted to enforce it require that before adding new pollutants, in this case copper, you have to have a plan for clearing up the creek, not just lessening the amount of copper that's going to be in the creek.

In essence, that was the matter that was argued before us, and our opinion is that in order to comply with the Clean Water Act, you have to have a plan to clear up the creek, and they have no such plan and, therefore, we disagreed with the Environmental Protection Agency that this complied, and entered a preliminary injunction against the company proceeding with the copper mine until they

have some sort of method by which eventually they would clear up the creek, and that plan would have to show how it was going to be done. They asked for *certiorari* to the Supreme Court, but did not ask for *en banc* review. The Supreme Court did not take the case.

Less is not more, is it? Less is not enough.

That's right.

Let me turn to another case—another mining case but in a different part of the circuit. This is a case that comes out of southeast Alaska, and I believe the name of the case is Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, but this is not a copper mine.*

No, it's a gold mine. It is a gold mine that had originally been designed to take care of the tailings and the amount that was dug out of the mine as they proceeded to put it on a dry land disposal site, which had been approved by everybody, including the EPA, and it satisfied the people who were the plaintiffs in this action. But then the price of gold dropped and went down to about $400 an ounce and they said, well, it's not going to be economically feasible for us to do this. So they designed a system in which the slurry that was coming out of the mine would be dumped into a nearby lake and it would raise the bottom of the lake by fifty feet, which would fill up the lake and spread the water over a considerably larger area. It also was acknowledged that it would kill all of the fish and marine life in the lake.

The representation of the Coeur d'Alene Mining Company was, "well that's alright because when we complete the mining in ten or more years, we'll restore it," and it was our opinion that, that was not sufficient–that again this was a violation of the Clean Water Act; it was clear that it violated one of the very regulations, specific regulations that said that you cannot dump this sort of slurry into a waterway, which they were doing. The opinion I wrote entered an injunction against them doing so. This case asked for *certiorari* to the Supreme Court, but did not ask for *en banc* review.

Going straight to the Supreme Court, is that common?

No, usually *en banc* is requested first.

One of the criticisms that's occasionally leveled against the Ninth Circuit Court of Appeals is that the court tends to favor environmentalists and environmental points of view. How do you respond to that?

Well, I think that our panel thought it was very clear under the regulations and the Clean Water Act that this was simply a violation; there was no agenda attached to it. From our point of view, it was simply a violation of the law.

And those laws apply to everyone across the United States.

Yes.

They're not unique to the Ninth Circuit.

Right.

Let me turn to another case; different subject matter and this involves Indian fishing rights. The case was United States v. Oregon, Confederated Tribes of the Colville Reservation. *I think you sat on this case with Judges Berzon and Bybee.*

Right.

Can you tell me a little bit about this case?

That's an interesting case from the standpoint of two Indian tribes fighting each other over the fishing rights at this particular location. Colville Tribes really are now representing a tribe that had joined as being a part of the Colville Tribes, the Wenatchi Tribe. The Wenatchi Tribe had had fishing rights at this location for many, many years–that's where they lived, that was their source of food, and well being. In the process of the federal government rearranging the tribal reservations, they had agreed that this particular fishing area would be maintained and, of course, that would be really to the Wenatchi's benefit. Instead, a new Indian agent came in and said, "yes, we'll reserve this reservation," but instead of it being where the Wenatchi had their fishing rights all these many years, "it's going to be up in the mountains." The chief of the Wenatchi said that they must believe that the fish swim in the mountains. It was clearly a wrong thing.

Then, eventually they cut another deal with the Yakima Tribe, whereby they had established a reservation around where the Yakima Tribe was and the Wenatchi didn't want to join that. They, of course, wanted their fishing rights back where they had been for many years. What was involved in this suit was the Wenatchis, now represented by the Colville Tribe, saying, "look we're entitled to our fishing rights there, we've been double-dealt here." That's what the source of the problem was. Interestingly enough, the two tribes had fished there, both of them, for quite a little while without ever having had this serious problem. This case involved the Wenatchis being able to fish there–they weren't claiming necessarily that Yakima couldn't fish there–but the Yakima Tribe was saying that the Wenatchis couldn't fish there. Anyway, that was the basis of the suit. It was our holding that the Wenatchis were entitled to fish there.

Interesting issue and interesting case. If I remember correctly, the Wenatchi fishing rights go back to well into the 19th Century–1850s or so when Isaac Stevens negotiated the treaties on behalf of the railroads.

That's right.

Some issues never die. Let me turn to a different class of people who bring their cases before the court. There was a case that involved a man named Erwin Schiff. This was United States v. Schiff. *Mr. Schiff had a somewhat unique take on the Internal Revenue Code.*

Yes, indeed he did. He had quite a business going about it. His theory was zero income tax–that income tax was voluntary, and nobody really had to pay it unless you just really wanted to pay it–that you didn't have to have withholding. He had a lot of tapes and lectures that he gave on this. He also had a book that he either had or was going to publish it. It was called *The Federal Mafia*, in which he was saying that the federal government was acting like the Mafia in taking your money when you didn't really have to pay it.

This really wasn't a tax case, was it?

No, it was a civil case against Schiff for promoting a process, which he promoted and made a lot of money out of, for avoiding the federal income tax. The basis on which he was doing it was just completely unfounded. The pity of it was with situations like that is that it isn't usually the people like Mr. Schiff, who are promoting all of this and making a lot of

money out of doing it that get hurt, it's the people who follow his advice, and then are either criminally prosecuted for tax evasion or for not filing their income taxes. They suffer the burden, not him. That was what was before the district court as to whether they could stop him from publishing this idea and conducting his continuing business–misleading everybody. Of course, the counter argument was that this was a violation of free speech and the First Amendment and that he ought to be able to publish what he wants and what he thinks about the federal tax code. The problem with it is, is that he was really advocating and attempting to show methods by which the law could be avoided–are clearly illegal–and so the district court–Judge [Lloyd] George, had entered a preliminary injunction, which we affirmed on appeal.

Did it end there?

You know, I have never found out what more has happened except that I believe that the injunction is still in effect, and I don't think the case has been tried. At least, we have never seen it further on appeal.

It's never the advocates who really lose out on these things; it's the people who become their adherents.

Yes.

Another case involving taxation was a case coming out of the year 2000—Desert Citizens Against Pollution v. Bisson. *Do you recall this case?*

Yes, I do.

Tell me a little bit about this case.

It actually didn't involve tax; it involved a situation in which the plaintiffs were the people who used a particular area of land, and were objecting to the fact that land was being exchanged for other land that the BLM had and that not a fair evaluation was given to the land that was going to be acquired by this mining company. The problem was that, in valuing it, they had used an old assessment, in which, in essence, they were saying that just this open land is being transferred for this other open land, even though it was well known at the time of the exchange was supposed to take place that the mining company was going to use it as a landfill. Landfills are much more valuable than just open space because you have to get approvals. As a matter of fact, they had gotten approval for establishing a landfill there before the exchange took place, and what our opinion said was that in considering the valuation of land being transferred, they have to take the highest and best use. It was clearly established by their having applied and gotten their approval that the highest and best use was for a landfill. I think the importance of the case was that, this, as to how you value land that is transferred, and I think it was important that we establish that you've got to take the highest and best use at the time, not some appraisal that had been taken a year or so ago.

So, in essence, the fact that they had already applied for the permits obviously demonstrates that there is a higher use to the land, but even without the permits, you're suggesting that it still had to be valued at its highest possible use.

Yes, and the fact that even if they hadn't gotten permits, as you say, the fact that this 1700 acres was right next to the mine, it was obvious why they wanted it and what they were going to do with it–that should

have been reflected in the appraisal of the amount to be paid. It's an interesting case to me in another way–in that I had a hard time convincing the other two judges on that. One at a time I did, eventually they both agreed, so I was happy about that.

Tell me a little bit about that process. How do you go about persuading a colleague to your point of view?

Well, it's really done through memoranda because everything we do we submit to the other two judges. For example, I don't call up the other judges and say, "look you're wrong." I submit a memo that goes to both of the other two judges. That's really an important aspect as to the way we work so that we don't have individual lobbying and so that everything that's done is made available to everyone on the panel. In that case, I had submitted memos as to why I felt that, that issue was very important, and why I thought that my opinion was right. I had to convince one judge first, but I also wanted to convince the other one and not get a dissent. So I wrote more memos pointing out my position and why I felt my position was right. I was happy I could convince them because I think it establishes a very important precedent.

Well, sticking with the idea about procedure in making decisions. After you have heard oral argument, several oral arguments in a day, the court–the three-judge panel–would retire to a conference room and discuss the cases.

Yes.

In that process, does it ever happen that you change your point of view about a particular issue?

Yes it does because when we go into the conference, we have just heard the arguments and heard the questions back and forth from the judges, oftentimes the questions are kind of intended to convince another judge. We don't know going into the conference what the position of each judge is, but sometimes you can tell by questions, and you will want to ask a question that will bring your position to the floor. When we get into the conference, we discuss it–so sometimes the discussion does change our views. I have definitely had my view changed a number of times. Just listening to the other two judges and how they are reasoning it–you go, well, I hadn't thought about it in quite that way.

I know from reading about the Supreme Court that there have been occasions when the justices will pass notes back and forth while they're on the bench during oral argument. Now, the one instance that comes to mind was it involved a baseball score, not a point of law, but does that ever happen on the Ninth Circuit where the three-judge panel passes comments back and forth?

On some occasions, yes. When Judge Chambers was active with our court, he did that very frequently.

Oh really?

Yes. He would even pass a little note about a quick summary disposition with the way he saw it.

Interesting. Because the Ninth Circuit covers a unique area in the United States, there are unique businesses in this part of the country, particularly here in the State of Nevada, with gaming, casinos, and the like. You heard a case

with your colleagues, Judge [Mary] Schroeder and Judge [Melvin] Brunetti that originated in the District of Nevada, involving the Venetian Casino Resort and a labor union, Venetian Casino Resort v. Local Joint Executive Board. *Tell me a little bit about that case.*

Well, that was a case that involved the question of whether the sidewalk in front of the Venetian was a public forum where the union was within its rights to demonstrate. The Venetian claimed that the sidewalk was a private sidewalk, whereas the union claimed, no, it was a public sidewalk. The reason why there was some question about it was that when the Venetian was being built, the Venetian plan was to take a part of the roadway as a turnout area, and, as a consequence, that would have left no sidewalk to go across. Part of the agreement with the state was that they would build a sidewalk across what is their property; therefore, it was the Venetian's position that the sidewalk was private. It was the position of the union that the sidewalk was not private under the agreement with the state, because in order to get this accomplished the Venetian was to put in a sidewalk that connects on either end to the public sidewalk and, then, it becomes a public sidewalk. The question was whether it was not a public forum because the demonstration was on private property.

It's an interesting question. Having nothing to do with the casino really, except that there was an easement of some sort initially. How did the court decide?

Our opinion was that the sidewalk was a public sidewalk because it was part of the agreement with the state and it was connecting to the other two ends of the public sidewalk and, therefore, it was a public forum, on which the union was entitled to protest. Judge Brunetti dissented on the grounds that in interpreting the agreement with the state it wasn't a public forum. It was a close case, we had a lot of discussions about it, but it was an interesting case in that way.

Of course, your colleague, Judge Brunetti, had many years before coming on the court been involved in legal matters as a private attorney in Las Vegas, in representing casinos and the like. Did he bring a particular unique experience to the decision in this case?

Not really. His was a different interpretation of the agreement between the Venetian and the state.

Turning to, in some ways, a much more serious matter, these are cases that you had that involved habeas corpus, death penalty. One of the ones comes from 2001, a man named David Murdishaw, who was a convicted felon serving time in San Quentin on death row. You heard this case with Judges [Warren] Ferguson and [Kim] Wardlaw. Murdishaw v. United States. *Would you like to speak to that?*

That was a case in which the essence of it was whether an instruction that was given under a 1978 provision of California law, was correct because the law had been enacted after the time of the charge for murder. Under the 1977 provision, which he maintained should be applicable, gave more discretion to the jury to evaluate whether the aggravating factors or the mitigating factors appropriately led to the death penalty finding. In the 1977 provision, it was quite clear that they were to be evaluated against each other. In the 1978 provision, the wording of it was such that if you found

aggravating factors, there was a question whether you really had to go further than that. We held that the instruction under the 1978 law was error because in evaluating the sentence, we really had to look at the standard for the 1977 statute because that was the one applicable to his case. We affirmed the guilt phase, but held the penalty phase had to be reevaluated and we granted the *habeas* relief and sent it back to the district court.

Do many of these habeas corpus cases end up in en banc hearings?

Yes. This one didn't however.

There was a case from 1998—Thompson v. Calderon—*which I think did end up in en banc review.*

Yes, and that was, in my opinion, a very sad case because there had been a problem that occurred with regard to the procedures so that the time for *en banc* passed before en banc was requested. It was because of a misunderstanding with memos back and forth and so forth. We held that the mandate, which had issued, should be recalled so that the *en banc* court could consider the issues that those of us who thought that the panel decision was wrong could be considered. In my mind, and a number of the judges of our court, it was a serious question of whether the wrong guy had been the one who had been involved in the murder. Two persons did some things together, but it was not clear at all in my mind that Thompson was the one who had raped and murdered the victim or whether it was the other guy. That's the reason a lot of us wanted to have *en banc* consideration. The reason why I say it is unfortunate is that our decision was appealed to the Supreme Court, and the Supreme Court, in a 5-to-4 decision, held that it was an abuse of discretion to recall the mandate—that once it had issued and en banc hadn't been requested and that it took some very serious consequences to recall it.

Do you recall who authored the Supreme Court decision?

Yes. It was authored by Justice [Anthony] Kennedy, and Justice Kennedy had said, in strong terms, that this recalling of the mandate in order to take it back and hear it *en banc* was a "grave abuse of discretion." That got played up a whole lot in the newspapers about the Ninth Circuit not only is reversed, but they committed a grave abuse of discretion.

Them's fighting words.

I think I was telling you that I had a good relationship with Justice Kennedy when he was on our court, and I used to kid him sometimes about his strong language. I have a picture with Justice Kennedy and his wife, Mary, and Barbara and I, and I had a copy made of that picture, and then I blanked him out of the picture, and I said that I had to do that for 120 days because of the fact that he said that this was a grave abuse of discretion when four of his colleagues found that there was no abuse of discretion at all. Not sure how he took that.

I see. [laughter]

My clerk said you're not going to really send that are you? I said, oh yeah, he knows that I kid him about this stuff.

Well, I know your relationship with him goes way back because I recall you telling me many years ago when we first started these interviews that when you first came on the bench Judge

Kennedy was helpful to you in setting up your chambers. You went down to Sacramento to visit with him and so you have a long, long relationship.

He was very helpful. He helped me get the clerks because I was appointed and confirmed in September; I was out of the normal sequence for hiring new law clerks so he helped me with getting law clerks, helped me with how chambers are organized, and told me that I didn't have to move to San Francisco.

Well, of course, these death penalty cases are a very serious matter and this has got to be one of the most difficult things that any judge has to deal with, it seems to me. You had another case where the defendant was a man named Stanley Williams (no relation to me). He was a defendant, sentenced to death, had filed a habeas petition with the court of appeals, and Judge [Ronald] Gould and Judge T.G. Nelson sat with you on this case in 2004. Williams v. Woodford.

Yes. That's a sad case to me, because it's a situation where the basic issue was whether there was ineffective assistance of counsel. Often times there has been ineffective assistance of counsel in these cases because the person who was appointed didn't have any experience with death penalty cases and made some mistakes that shouldn't have been made. In this situation, that was not the case. This was a very experienced attorney who did a very good job. Actually, his community had awarded him as Attorney of the Year. So it was not a person who through inexperience made mistakes; he tried the case very well, with the law as it was at that time. I could really find no fault with the way he had represented his client, and there was a whole lot of evidence that the murder had actually taken place and the circumstances that had taken place and so forth, and there really wasn't much you could ever find fault with what was done. From that standpoint, it had to be affirmed and why I say it's sad is because he'd been on death row for twenty years. He was a guy who had been one of the founders of the Crips gang in Los Angeles. He had a lot of bad things in his background, and I'm sure that's what the trial attorney was worried about of trying the case in a way so that those things didn't come out, but as part of that gang, he had done some very bad things. The situation was that after he had been in prison for a while, he did a lot to discourage young people from joining gangs, and there were some organizations who had utilized his testimony and writings, and several occasions, he would be telephoned into a gathering to say that this is a terrible mistake to join these gangs–look at what's happened to me–you shouldn't do it. Interestingly enough, I hadn't realized that there's apparently a Crips gang in other areas of the world–there's one in Switzerland, and a legislator in Switzerland had nominated him for the Nobel Peace Prize, which is an unusual thing for a person that's serving a death sentence on death row to be nominated for a Nobel Peace Prize. That occurred, along with some of the organizations that appreciated what he had done to try to discourage gang activity, showing that he had really rehabilitated himself; if you're going to count what happens in prison with regard to people rehabilitating them, he was a prime example. At the end of that opinion, which had affirmed the death sentence, I added a paragraph, saying that this was a situation where the conviction and sentence would have to stand but that it would be certainly a likely possibility for clemency from the governor, either as a pardon or a commutation

of the sentence, thinking mostly commutation of the sentence would make sense. I was hoping that I might have some influence–it did not. His sentence was not commuted, and he was executed. I felt bad about that because a person who has rehabilitated himself to the extent he had seemed worthy to have commutation.

A difficult case. There had been a number of calls from high places for reform of habeas review and for changing how death penalty cases are handled in fact I think one of your colleagues on the court of appeals, Judge [Arthur] Alarcon, recently made some proposals to the State of California. Do you have some opinions about habeas reform?

Well, I haven't really thought about that as deeply as apparently Judge Alarcon has. I would think that one thing that's a problem is that it is so expensive, particularly in death penalty cases, where it takes a lot of funds for the investigation and for the attorneys involved because they have a very serious job to do to defend somebody whose life is in their hands. One of the things that I actually worked on with Judge Alarcon was to get some sort of a budget established so that the attorney presents a sort of thing that he feels is necessary to do and the money that's involved, and I think that's a good idea. For one thing, the attorney will never feel that he's done his job unless he exhausts every possibility, so getting the judge to consider whether what he proposes is going to lead to anything is a good thing–it kind of lets him off of the hook too. I think that's one thing is a good resolution. The other thing that appeals to me in death penalty cases is the fact that I really have serious doubts that the death penalty is worth it.

How do you mean that?

Well, I think that those states that have life in prison without parole as the top punishment—in our circuit it's Hawaii and Alaska—they don't have any increases in murder or anything as a result of that. The case is closed when that sentence is invoked; the victims' families are not waiting for years to have a closure of whatever occurred. I think there obviously will be some *habeas* matters, but they're not going to be extended to the extent that the death penalty ones are My feeling is that life without parole is a serious punishment, doesn't release a dangerous person back into society and it gives closure to the families of the victims. Then, of course, there's the worry, as we are seeing now, where people have been wrongfully convicted–as DNA shows–when you have life without the possibility of parole, you can correct mistakes like that and in executing the person you cannot.

That's very interesting. Let me turn to some lighter cases.

Good.

Because of where the Ninth Circuit is, there are celebrities in the Ninth Circuit, I guess there are celebrities just about everywhere these days, but the Ninth Circuit seems to be particularly rich in celebrities and celebrity cases, although most of them do not end up in federal court, thank goodness. But there was a case from 2001, involving some surfers and a clothing retailer, Abercrombie & Fitch. Downing v. Abercrombie. *Do you recall this case?*

Yes, I do. The surfers were objecting to using, without their permission or any sort

of compensation, some of the pictures of the things that they had done surfing were being used to benefit Abercrombie & Fitch. The surfers sued to enjoin it, and I suppose their idea was that if you're going to use it, then we should be paid for it. We held that they should be paid for it.

There's another case, coming from an earlier time–a few years before that–1998, which involved a brewery, Coors, out of Colorado and a former baseball player, Don Newcombe, who pitched for the Dodgers. What were the issues in Mr. Newcombe's case?

Yes. That was interesting to me because when I looked up from oral argument, I saw Don Newcombe out there watching the proceedings. The issue there was that they had used, not a photograph, but a portrayal of what was very similar to his unique style of pitching. He lifted his leg a lot higher than some did and the cap he was wearing–anyone familiar with baseball would have really recognized that it was him they were portraying. Once again, he was saying they're using my image without my permission and that he needed compensation. We found for Don Newcombe.

Well, as a life-long Dodger fan, I'm really pleased to hear that. [laughter]

You probably would recognize his pitching style.

He was through pitching by the time I became aware of the Dodgers–I really didn't follow the Dodgers until they moved to Los Angeles, and his pitching days were pretty much over by then. I know he is still alive and still employed by the club, as one of the Dodger greats. That's not to say anything about the brewery–Coors is a fine brewing company too.

Coors probably thought it was all right since they didn't use his picture. When pointing it out, it was pretty clear they were modeling the portrayal after Don Newcombe.

OK, so when you get a case like this you're dealing with the legal issues and the merits–so in some ways it's a different matter altogether. We've talked about this afternoon a lot of cases you have written opinions for in the last ten years or so. Is there any case that you can recall that we've overlooked?

I think we have gotten most of the cases that I would identify.
Good, good.

There are a lot of opinions; I was surprised when you furnished me a list and I was going through them I didn't realize that there were that many that I had written.

You are a prolific opinion writer. But every judge on the Ninth Circuit carries an enormous caseload. It's extraordinary.

Yes.

14

The Chief Judgeship

I owe you congratulations for becoming Chief Judge of the Ninth Circuit.

Oh, well, thank you very much.

It occurs to me that maybe I ought to ask you a little bit about being chief judge or how one becomes chief judge. How does that come about?

Well, it's actually a matter of seniority. The statute provides that the person who is the most senior judge and under age sixty-five becomes the chief judge. And you can accept the chief judgeship any time before sixty-five, and if you do, you can serve until you're seventy. There is also a time limitation on being a chief judge that is seven years in the event that the earlier time doesn't cut you off. So it's seventy or seven years whichever is first.

Has it always been like that?

No. That was changed in the middle of Chief Judge Browning's term. He was grandfathered in, so he served thirteen years. Immediately prior to him was Chief Judge Chambers, and he served for seventeen years.

Has there ever been a chief judge to your knowledge who served longer than Judge Chambers?

That's the longest I know of.

I would think if one were to serve seven years—that ought to be plenty of time.

That's plenty of time.

It's a big responsibility, I know, and I think the circuit is in excellent hands with you at the helm.

Well, thank you.

Tell me about your investiture ceremony, which, for me, was quite a unique ceremony, and it

obviously held some meaning for you. Tell me how that came about.

Well, actually, my former law clerks arranged it. The idea of it was to have local participation, in the fact that I was actually the first [Ninth Circuit] chief judge to come from Nevada and so it was a very nice affair. A lot of our judges were in attendance, and a number of my former clerks spoke and others. We had a very good singing group too that participated. There was quite a large attendance from this community and it was very nice to see all of them.

It had to have been held in a large place, wasn't it?

Yes, it was held in the Lawlor Events Center, which is the basketball pavilion.

At the university?

Yes.

That was a wonderful occasion, it really was. As I recall Senator Reid was there, and I think he spoke?

Yes.

For you personally, what sort of challenges have you faced in your first few months as chief judge?

Well, one of the first challenges was the immediacy of the circuit split legislation. I assumed the office on March 1st and right about that time, the circuit split bill had just passed the committee, which would have split the circuit. The nine western states would have been split in this way—that California and Hawaii would have been the remaining Ninth Circuit and the other seven states would have been the new, what we affectionately refer to as the "String Bean" circuit. When initially it was introduced, Bill SB 956, it would have split off the five northern states, Alaska, Washington, Oregon, Idaho and Montana. But that was not going to pass the committee so they added Arizona and Nevada to it with the idea of obtaining Senator Kyl's vote and by putting the headquarters of the new Twelfth Circuit in Phoenix.

I'm sure this is an issue that will come back in the future.

I'm sure it is, too.

This doesn't want to go away. Have there been other challenges that you've had to face as chief judge in your first few months?

Well, let me tell you about that challenge. I related this to you briefly in an earlier interview. You might be interested in details of what happened. I flew back to Washington right away, and I sent out an all-points bulletin to all of the judges to write to their Congressmen, which they did. A lot of the judges wrote, and we mobilized some effort on the part of the bar. We had a lot of resolutions that—a lot of work had been done before this too—but the one, why I was most interested in getting all the judges to write, and a lot of them really, a lot of them did, and that helped a lot, but Judge [James] Browning and I went back to Congress to do what we could to avoid this bill from passing the Senate. And we were at that time concerned with obtaining at least forty-one votes so that it could be filibustered and it would have to be broken. Senator [Conrad] Burns then had the bill attached to the appropriations bill and this was interesting in this way. We had been

working with Senator [Dianne] Feinstein and Senator [Harry] Reid, and we had seen about twenty-five senators or their staff, and we had quite a lot of support. We would have been able to sustain the filibuster, and I think it would have been defeated, but Senator Burns had asked for unanimous consent to substitute or to amend his bill to provide for the commission that Senator Feinstein had requested. The commission would study the circuit split, the structure of the circuits throughout the nation for two years and then report to Congress, and we were very happy that was the case. Judge Browning and I went down to the commissary there and celebrated with a glass of orange juice only to find out we got a call back very shortly that, indeed, this had been amended. There is some sort of a secondary amendment process. This bill that had received the unanimous consent to be introduced could be amended without unanimous consent, and the amendment was to split the Ninth Circuit. So, in other words, we had the bill to have this committee study the structure, but there is an amendment to it in the meantime to split the Ninth Circuit. This was attached to the continuing appropriations bill. This could not be filibustered, and since it couldn't be filibustered, it was now fifty-one votes is all it would take to pass, so we were very concerned.

Then, the next thing that happened was that Senator Feinstein and Senator Reid had said this was a non-germane amendment, and it should be struck for that reason, and the parliamentarian ruled it was non-germane, and there was a failure to appeal that ruling from the chair so Senator Reid called us, we were there and available in one of the rooms of his office, and said, we can beat it because it wasn't appealed. We were about to celebrate again and then we found, no, there was another ability to amend by the person who was in charge of the appropriations bill, Senator [Mark] Hatfield, and he felt sorry for Senator Burns that he had not been procedurally alert. In fact, he was sitting in the chair at the time—he was chairing the Senate at the time—which was really interesting. We saw the thing on TV. Hatfield provided another amendment so now it was about to go through as an amendment to split the Ninth Circuit in the meantime. Well, then Senator Reid and Senator Feinstein were very upset saying this was a complete misuse of the unanimous consent process. It was a trick, really, to get unanimous consent to a commission that everybody wanted on our side and then to have this other amendment to it. And so the leadership of both parties became very concerned because both Senator Feinstein and Senator Reid made speeches from the floor that if this is the way the unanimous consent procedure is going to be used there are going to be no more unanimous consents this session.

Then, they got very concerned, as a result of that they struck a compromise to amend the bill to create a commission. It was to report in one year, and the commission was to be by three named by the Senate, three named by the House, three named by the Chief Justice, and three named by the President. Well, they cut it down to two named by the President so that was the compromise, one year reporting and only two by the President. That was sent over to the House. Well, Congressman [Carlos] Morehead, who was chairman of the key subcommittee, was opposed to having a commission that was only to report in this short of time, because it was obvious that a legitimate study could not be done in that time. So he didn't do much on the bill. As we got closer to the time that the Senate was going to adjourn, all the ex-chief judges and I signed a letter saying that we would really

like to have the commission because we felt that was a way we would really get a legitimate study of the entire thing, addressing some of these concerns that I've just expressed to you earlier, and I went back and sat in Congressman Morehead's office with his staff, and they were very nice, very cooperative. He called Senator Burns and he said, "You know, if you'll agree to two years and the three for the President so that it's evened out, we'll process the bill."

In the process in those last hours of the session, there had been a lot of things attached to that appropriations bill and those persons who were concerned, the appropriations chairman of each of the committees, I think just figured, if we're ever going to get this through we have to just eliminate all the extraneous things that don't really pertain to the appropriations. So this was one of the things that got eliminated. And so that's why there is now no commission legislation.

Ah ha. So there is no commission.

There is no commission.

I didn't realize that.

I related all this to you, because this may be the only place where that story is going to ever be known. [laughter]

Well, that's very important for us to have, I think. It's a byzantine story, and I've heard pieces of it before but never on one long explanation from a key participant. What do you think is driving Senator Burns to do this? Is he really thinking that this is going to improve the administration of justice?

Well, it'd be hard for me to say. I think that there is a perception perhaps with Senator Burns and Senator [Slade] Gorton from Washington, who is also very key in this, that liberal California judges are making bad rulings on environmental issues. That was initially the reason expressed in the newspaper. After that, that reason was downplayed and was made to be that it would be more efficient, and it's too large. But if you really want my view as to what's driving it, it's that. I think that a lot of the supporters of the two senators are very upset with environmental rulings in general. What's really odd about it is the "liberal California judges." There are really more Republican appointees in California than there are Democrats and some of the key decisions, like the spotted owl decision, was written by Judge [Alfred] Goodwin, who is a long time Oregonian.

And a fairly staunch Republican as well.

Oh, yes, that's right. The perception is really wrong, very, very wrong, and it is not fair with regard to the administration of justice either because our circuit has been not only a very collegial circuit, but it's been innovative in so many ways. When I was back at the Administrative Office [of the Courts], they have an orientation session for new chief judges, and I was just struck by the fact that various department heads would come in and talk about things, and they'd talk about what was going on in the country and what they were doing and four or five times they would say, "Well, that's like the program that was initiated in the Ninth Circuit." That sort of impressed me, and that's really true. I know that Judge [William] Schwarzer from the Federal Judicial Center said that too, that when he got to studying into it he realized how much really the Ninth Circuit had done as far as innovation.

It's these innovative westerners again.

That's right.

So you see, in many respects, you see regional differences in the judiciary throughout the United States?

Yes, there are. We're all charged with enforcing the national law, and I think we're conscious of the other rulings that are made elsewhere. You know it's probably five percent of the cases where there is some real difference, but they're the ones that are kind of cutting edge cases and get the publicity.

Sure, well when you think of how many cases there are just in the Ninth Circuit. For example I think, and I've heard [Clerk of Court] Cathy Catterson, well at that session where you spoke in San Francisco, that there was some eighty-four to eighty-five hundred.

That's right, yes—active cases in the Ninth Circuit. And then to think there are just a handful of these that are ones that people get worked up over. That's right.

15

Changes in the Ninth Circuit

You served as chief judge during a period of extraordinary circumstances, I think, in the Ninth Circuit. Among the broad things that happened during your tenure: there was tremendous caseload growth, both at the court of appeals and the district courts, there were extraordinary vacancies on the court of appeals, which presented significant issues, and then, of course, there were several attempts to split the circuit into at least two circuits. And, I think, we want to go into some detail about each of those things. Let's start with the matter of case filings. My research indicates that case filings in the Ninth Circuit Court of Appeals during this period between 1996 and 2000, rose from something like 8500 to 10,000 per year?

Yes.

And in the district court level there was an increase of some 29-to-30 percent and an increase in case filings of about 48,000 to some 59,000. Can you speak a little bit about what was happening first at the court of appeals and then maybe at the district court level about the causes for this caseload increase and then how it was managed?

Well, one of the problems was that Congress was identifying more crimes as federal offenses. We, of course, had an increase in the immigration cases. Aside from that, it was the fact that the population had grown and there were new statutes from Congress that were being adjudicated. How did we handle it? Well, we had a hard problem at the beginning of my tenure because we had so many vacancies. At one point, we were ten judges down. Eventually, we were getting them filled, but I know that in speeches that I was giving around the circuit was to encourage some pressure to get the vacancies filled because it was taking a long time for them to be confirmed by the Senate. Some of our judges took four years for their confirmation.

That's a long time.

William Fletcher and Richard Paez, I know, each took about four years before there was a confirmation.

During this period when there were so many vacancies on the court of appeals, administratively, how did the court handle distributing the caseload?

Well, all our judges were extremely busy during that time. The senior judges were most helpful in handling the increased caseloads. We brought in visiting judges from other circuits, and we brought in a lot of our district judges to fill out part of the panels so that we could try to keep as many panels hearing cases as we could.

How is that managed, the visiting judge procedure, or is it managed locally by the court of appeals in the clerk's office?

It's really managed locally, except that the transfers from other circuits have to be approved by the Administrative Office, in fact, by the Chief Justice [of the United States].

Oh, the Chief Justice gets involved in that; that's interesting.

But generally, it's very easy to get their approval, especially when it's a circuit that needs a lot of help, like the Ninth Circuit.

I would imagine so. Did you take an active roll in helping to advance the confirmation process for judges who had been nominated but were having difficulty getting confirmed?

Yes, from that standpoint, I certainly got the assistance from the senators from Nevada and encouraged all of the judges and the bar to notify the senators in their states that there was really a dire need to have those vacancies filled. I think that helped a lot.

Did the Lawyer Representative Coordinating Committee have a role in that?

It did. They were very good about that–a very big help. Also, some of the bar associations in the states were too.

You took over as chief judge from Judge [Clifford] Wallace. Talk to me if you would a little bit about the transition from Judge Wallace's administration to your administration.

Judge Wallace was a very easy person to follow because he was so well organized, and he was so conscious about court administration that a lot of things that he had started or had accomplished were a great help to me. Judge Wallace wanted to stick with the tried and true CCI system because of its email capabilities to the wide range of judges throughout the Ninth Circuit; however, when I took over, it was time to bring the circuit into the 21st Century and update our computers to PCs like the other circuits were doing. Of course, that transition has been very successful, and we haven't looked back since.

So there was a regular simple transition from his administration to yours. How would you describe your administrative style?

I think what I was probably most conscious of was to keep a very good tone among our judicial family, the circuit court of appeals, as far as continuing what Judge Browning really had started–a very collegial circuit that had been maintained throughout his tenure. I thought that was one thing that was very important, because I had seen a lot of courts torn apart by antagonism among the judges,

and I was quite intent on assuring that didn't happen. Lots of times with our new forms of communication, such as email, it's easier to send something out without thinking how it sounds to the reader or without the buffer of a secretary using discretion to hold it and have the sender review it a second time before sending. One of the things during my tenure that I tried to do was to diffuse a lot of that with humor when the emails got a little too sharp, I'd try to kid them out of it. That worked very well actually.

In addition to maintaining the collegial atmosphere in the Ninth Circuit, did you have other goals when you became chief judge?

Yes, one of the goals was to continue to make the production that we got from the staff attorneys continually improving. One of the things that had happened earlier was that we had a practice that I never liked–we would bring in a supervisor from an academic institution to be the director of the staff attorneys for two years. Well, the first year would kind of be adjusting to what our court was doing and what the staff was doing; then, the second year, they were getting ready to leave. So that didn't work.

One of the big changes that started during Chief Judge Wallace's administration, but I think was largely due to Cathy Catterson, when she appointed one of her deputies to be in charge of the Staff Attorney's Office–that's Molly Dwyer. From that point on, the production in the Staff Attorney's Office started improving a great deal. The program of orally hearing screening cases started when Chief Judge Goodwin appointed a committee that I chaired with Judge [Mary] Schroeder and Judge [Edward] Leavy. We had thought that it could be worked out that the staff attorneys could present to three judges the cases that were relatively straightforward and easily decided because they were governed by existing precedent or there was no jurisdiction–that sort of thing. The court was a little bit skeptical about that whole approach so we tried it for a year–Judge Schroeder, Judge Leavy, and I—in trying that out and showing the rest of the court how that worked, that program was then started. However, as I was mentioning, without the continuing leadership in the Staff Attorney's Office we were having a hard time getting the number of cases that we had felt could be done, accomplished. The thing that helped a great deal, as I say, was when Molly Dwyer took charge. We were trying desperately to get a goal of sixty cases per month decided that way and never really reached it until she got in charge. Now we are getting about 150 or more cases decided per month in that way. The screening process takes a great deal of pressure off of the court and the merit panels because those cases can be resolved without all the formality of oral argument.

I do note, however, that one of the important phases of that is the fact that if any one of the three judges feels that this is a case that deserves more attention, then that case will be kicked off by the one judge to a merits panel. That happens with maybe ten to twenty cases in a month's screening session.

Talk a little bit, if you will, about the process of this screening program what the staff attorneys do. Do they brief the cases?

The staff attorney that's in charge of the particular case naturally reads all of the briefs, all the materials, comes to the three-judge panel completely prepared to answer any questions that the judges might have and usually with a proposed brief memorandum disposition. One of the things

that impresses me with the staff is that they take it very seriously when they are going to give a presentation to three judges–it's a little bit intimidating I think–and so they are extremely well prepared so that when a judge says, "I'd like to see that affidavit." They have it right there. Or, "what is that portion of the brief that discusses that?" They have it right in front of them. This type of preparation gives us a lot of confidence in the thoroughness of their examination and then the fail-safe is that if the judges feel that there really is more to this case than just a screening case, then one judge can kick it to a merits panel.

Is there any ranking of cases? That one case has a higher priority than another or something of that sort?

Yes, we used to rank our cases–1, 3, 5, 7, and 10. The "1" cases now are all I'm discussing–the "1" weighted cases. It seems to all of us now that the cases we hear at oral argument are a lot harder than they used to be and that's because the screening cases have been taken off, and they were all the easy ones. When we would get a panel of cases, there were usually two or three that would be pretty easy cases. Well, those have been pretty much taken off at screening. Generally, the 3s, 5s, 7s, and 10s are pretty hard cases that are heard on oral argument.

Are many of these cases that are screened for relatively simple disposition pro se cases?

Yes, quite a few of them are. Lots of times it's a prisoner that feels he should have some additional matter discussed and sometimes that's true. When there is a *pro se* case that we feel has some potential merit, and we feel that it should be considered by a regular merits panel, usually we will have a *pro bono* counsel appointed to argue it and prepare a brief on it. We have a particular staff attorney that governs that program, and she does a very good job. Susan Gelmis, who is the staff member responsible. She has developed through some of the law schools and otherwise a *pro bono* program so that these people can be appointed as counsel. They are guaranteed when they are appointed that we will hear it in oral argument.

That's good; that must encourage them then.

Yes.

In addition to maintaining a collegial atmosphere and assuring the increased review of cases by staff attorneys, did you have other goals?

Well, when I first came on, the hottest topic, and one that consumed a great deal of my attention, was all the attempts to split the circuit. So, one of my major goals was to keep the circuit from being split; a second goal was to fill the vacancies; and a third goal, I suppose, was to keep the circuit running smoothly. I also felt that we had to pay considerable attention to the problems of the district court, both with regard to construction of facilities and increased caseload. Also, if they were overloaded because of a lack of appointment of judges, I felt it very important to assure that we were paying adequate attention to those needs of the district judges, including the bankruptcy judges and the magistrate judges.

In the mid-90s, the District of Nevada received two additional Article III judgeships. Did that happen on your tenure or was that before?

I think it was on my tenure. We had been asking for them for quite awhile.

I know it wasn't a simple process, and it wasn't a short, brief process, these things never are; and, of course, when new judgeships are considered for one district, Congress has a way of wanting to consider new judgeships for another district, and then another district, and pretty soon we're talking about an omnibus bill aren't we?

Well, actually, that's the way the judgeships are generally appointed. Is that there's a Judicial Resources Committee, which is part of the U.S. Judicial Conference and is the committee that recommends the new judgeships. They take into account the cases per judge that each of the districts or the circuits courts of appeal have and try to be fair about allocating the new judgeships on the same basis for all of the districts and all of the circuits. That's what normally goes to the Congress is this judgeship bill that's been approved by the Resources Committee and, in turn, by the U.S. Judicial Conference. It's rare that there are judgeships appointed that are outside of that recommendation.

Of course, as chief judge, you had a role in the U.S. Judicial Conference, didn't you?

Yes.

Tell me a little bit about that.

Well, a lot of the U.S. Judicial Conference is run by the committees so that when we come to the actual meeting of the conference, which is held twice a year, we are really considering the recommendations of the committees. They do a lot of good work–like I just mentioned the Judicial Resources—but there are committees on fiscal planning, security, ethics, and all of those various areas. When I was there, Chief Justice Rehnquist was presiding, as the chief justice always does over the U.S. Judicial Conference meeting. He presided very much in accordance with Roberts Rules of Order. [laughter]

This was not an informal proceeding. [laughter]

No, it was not. [laughter] It was also very important that everyone get there on time, or the person who didn't would be very embarrassed. All the questions were addressed to the chair–there was very strict compliance with Robert's Rules of Order.

What committees did you serve on for the U.S. Judicial Conference?

I served two terms on the Judicial Resources Committee, which was a very important committee for us because it was determining the number of judgeships to be allocated for each circuit. The hardest one was the court of appeals—there was some resistance because there was a general view that the Ninth Circuit was too big. I was able to get through the request for the additional judgeships we needed, although they never really got many of them finally approved by Congress. We got them through the Judicial Conference at least.

Did you have a choice of this committee assignment or did the chief justice just decide that this is where you belonged?

I did request that one, but the chief justice ultimately makes the decisions.

Sure, but he obviously takes into consideration the individual's interests and desires of what committee he or she wants to serve on.

Yes, exactly.

Was there any preparation between you and Chief Judge Wallace prior to you becoming chief judge? For you to assume this role? Did you ever run the circuit conference or anything like that?

I had run the circuit conference, yes. I had been the chairman of the circuit conference, and I had been on the Ninth Circuit Judicial Council, the Executive Committee, and I had been in most of those positions earlier so, in that way, I was prepared.

Did your successor have a similar experience?

Yes. I made sure Judge Schroeder similarly was on those various committees and had the same kind of an opportunity to be fully aware of the administration of the courts. I think that is important because it's known for some period of time before whose going to be the next chief judge. I think all have made it a point so that the next person is well equipped.

That's good. I think that must contribute to the collegial atmosphere? As well as make for a smooth transition from one chief judge to the next?

It does.

A student of the court once said that the chief judge is the principal point of contact for every concern, suggestion, complaint, and request. Another has said that the chief judge is the lightning rod for kooks. Maybe that's overstating it, but did you find that in your situation–that you get a lot of correspondence from outside the court, or even contact from within the court–people coming to you with particular issues?

Yes. I did have a lot of that and a lot with the press. I thought the press relations were very important, and I always responded to the press when they called. I know there is some reluctance for judges to do that, but I thought it was very important that the press was aware of what we were doing. Sometimes I couldn't comment, obviously, on particular cases, but they came to fully understand that, and sometimes I would explain what the procedures would be and what would be happening off the record, and I would make that known before I said it. The press always honored that; I never had a problem that when I said something was "off the record," so that I could explain the procedures that were going to be followed, or other things like that–they appreciated my candidness and kept my comments off the record.

How did your caseload change or how did the management of your chambers change as a result of you being chief judge?

Well, I had a person who was an administrative assistant to me as the chief judge in my chambers, and that was Mary Smotony. She was a great deal of help throughout all of this. Then, as chief judge, we were authorized an additional law clerk and that helped too because I needed some further help with regard to keeping myself current on the cases.

Did you take a reduced caseload?

No, I didn't, that's why I was glad to have the additional clerk. In fact, as chief judge, I was on all the *en banc* cases.

That's what I was about to ask you about. Tell me about the en banc cases and how that's determined. You, as chief, have to preside?

Yes. When a case is considered by one judge to be not correctly decided, that judge

can request an *en banc* hearing. Then, all of the active judges vote on whether to take the case for an *en banc* hearing, and if a majority of the active judges decided that the case should be taken *en banc*, it is taken *en banc*. Then, the clerk's office draws out of a little container that has various balls in it with judges' names to see who will be on the *en banc* panel. The *en banc* panel consists of the chief judge and ten active judges that are chosen. As you say, I preside as the chief judge. I have to say, that is one of the most stimulating things I believe on the court is that when the eleven judges are there, at least when I was chief, we would go around the table, and I always thought that it was remarkable that with all of the thought that I had given to the case ahead of time, there was always something new brought to the table that I really hadn't thought of before. I think all of us feel that way–so it is a very stimulating discussion at the conference after the *en banc* hearing. During the *en banc* hearing, it is also stimulating because of the questions that are asked and brought up by the judges from the attorneys. But the most stimulating part about it to me is the conference, after the hearing, when the judges are discussing the case.

It must be. With all those intellects around the table and all those different points of view, you must get very lively exchanges at times.

Yes, we do.

So much of the coordination of the en bancs while you were chief was handled by the clerk's office?

Yes.

Did you participate as chief judge in motions and screening panels–was that a regular part of your routine?

Yes, I did.

Was there any change in the number of calendars that you would participate in?

No, it was the same number.

Was there any problem with aging cases that were under submission?

Well, there was because of the fact that we were so short of judges that we would have a problem of a backlog building up necessarily. We were always trying to develop ways that we could avoid having a backlog buildup but it was very difficult without the adequate number of judges.

Were there any special techniques or procedures that were developed to handle that problem?

Well, the one that I have mentioned–the screening program. That essentially was it–that and adding a third judge either from another circuit or from our district judges so that our panels were frequently made up of two of our judges and one visiting judge.

Did the visiting judges tend to get an assignment of opinion writing?

Yes, they would get the assignment of opinion writing on the cases that they were responsible for, which was about the same number as the other two judges on the panel.

That would help spread the caseload around a little?

Yes.

Tell me about working with the clerk of court versus working with the circuit executive.

Are there overlapping responsibilities for the management of the circuit?

The clerk of court manages all of the things for the court of appeals. I believe we have the finest clerk of court in the entire country in Cathy Catterson, and I think all of us in the circuit would agree. She is able to handle the diverse personalities and the problems that are involved in this extreme caseload increase, with great ability. The Circuit Executive's Office principally deals with the district courts and the facilities for the district courts, the problems that are involved in the district courts, like for example, shortage of judges and sending a judge from Alaska, for example, might sit in Hawaii because Alaska did not, at one point, have the pressing caseload that Hawaii did because of the fact that we couldn't get a district judge appointed there—that sort of thing. The Circuit Executive's Office also handles the Ninth Circuit Judicial Conference and also the various district conferences throughout the Ninth Circuit, they provide staff service for those things. Essentially, the Circuit Executive's Office deals with the district courts, and the clerk of court deals with the Ninth Circuit Court of Appeals.

And now those two functions are almost combined, aren't they?

They are in a way, in that, Cathy [Catterson] has now become the circuit executive, and Molly Dwyer has now been appointed as clerk of court. But I suspect just because of Cathy's experience that there will probably be a greater coordination between the two offices.

I see. I would suspect the same. Other responsibilities, of course, for the chief judge, is doing things like conducting court meetings and executive committee meetings. Tell me a little bit about, is it the circuit judicial council that oversees the administration of the courts?

Yes, the circuit judicial council, and it's made up of an equal number of circuit judges and district judges, with representation, actually non-voting representation, from the bankruptcy judges and the magistrate judges, and also a representative from the senior judges. Actually, our circuit, among the many things that we originated in our circuit, one of the things was that the judicial council had always been composed only of circuit judges, and we thought that was not a good idea; we changed ours so that there were an equal number of district judges and an equal number of circuit judges. That eventually became the statutory requirement, but it was not until we changed it.

Why did the circuit take that position?

We felt that the district courts should have equal representation on the administrative of the whole circuit.

Just a little more fair all the way around—a little more democratic and less from top down.

Yes.

As chief judge, you, of course, preside at the circuit conference. Were there any unusual circumstances surrounding the circuit conference when you were chief judge? Was there any change in the way the circuit conference was put together?

I, as chief judge, and the chief judges before would appoint a chairman of the conference and a conference executive committee that would take charge of putting the conference

on, so it was really the responsibility of that chairman and executive committee as to the type of conference that will take place. The executive committee had terms of three years so there is some carryover.

From time-to-time Congress has scrutinized the circuit conference or the circuit conference process. Was there any such scrutiny when you were chief judge that you recall?

No.

Do you recall where some of those conferences were?

Yes. We had them in Sun Valley, Idaho, Hawaii, Portland, Seattle, Santa Barbara, so it's around the circuit; we have had them in Alaska too.

Oh really, that's far afield. But never in Guam?

Never in Guam.

I don't think in previous years, there was never a conference in China? Would the Ninth Circuit extend that far? [laughter]

No, I am sure there was some considerable thought given, but it was never held there. [laughter].

Well, let's turn to the big issue that really you had to confront as chief judge, and that is the attempts by Congress to divide the circuit. Tell a little bit about what you did to keep the circuit intact.

Right after I was appointed, there was a very serious attempt to split the circuit that was moving fast in the Senate. Judge Browning and I went back to Washington, D.C., and talked to a lot of people, and I won't go over that again, because I went over it on two different tapes before. But that was the first time and what had happened was through the strange procedures that took place, it was defeated in the Senate, which ended it for that year. Then the next year, there was an effort to split the circuit, and it was a very serious one because Senator [Ted] Stevens from Alaska had been upset about a particular decision that had been made in the Ninth Circuit Court of Appeals about taxation. He said that he was going to help Senator [Frank] Murkowski from Alaska get this circuit split. He attached it to an appropriations bill; and, of course, he was chairman of the appropriations committee in the Senate and very powerful. To the rest of the senators who didn't care all that much about a splitting of the Ninth Circuit, as compared to whether they were going to get an airport or a road or bridge or something, they weren't going to buck Senator Stevens. The bill was attached to the appropriations bill and could not be filibustered, and passed the Senate.

Our big concern at that moment was that we had to do something to defeat it in the House. I remember that we had a meeting of our circuit court before I was to go back to D.C., and the way it was supposed to be split was not a satisfactory way and it was–Arizona and the five northern states (Alaska, Washington, Oregon, Idaho, and Montana); then Nevada, Hawaii and California, with Guam and the Northern Mariana Islands, as the remaining Ninth Circuit. I think it was engineered that way because Senator [Jon] Kyl from Arizona wanted to be part of the northern circuit. We called that the "Hop Scotch Circuit." [laughter] Anyway, what we were concerned about was that there were no hearings held on

that particular split at all; it was just attached to the appropriations bill. It went over to the House, as a part of an appropriations bill, which made it difficult because it didn't go to the judiciary committee, which was chaired by Congressman [Henry] Hyde, it really went to the appropriations committee, and our relationship with the appropriations committee was difficult, which made it hard to get influence on to the committee. It was a very poor way to split a circuit, without a hearing as to the particularities, and so that was what we were particularly stressing. Chairman Hyde was extremely helpful in that. The appropriations committee respected Chairman Hyde's opinion a lot. It was also a great help that [Circuit] Judge [Charles] Wiggins was with us because he was a very good friend of Congressman Hyde, and Congressman Hyde had a great deal of respect for the opinion of Judge Wiggins as a former Congressman. Judge Wiggins joined Judge Browning and me in attempting to defeat the bill.

The approach that we were taking was that this really should not be done without looking at all of the circuits, with a type of commission that Senator Feinstein had recommended in previous bills that didn't pass. Our approach, then, was that there should be such a commission appointed to study all of the circuits. We thought that some of the circuits, particularly the 11th Circuit, which was following the idea that they were going to have no new judges whatsoever, regardless of the increase in caseload. They had twelve judges, and they were going to handle matters with just the twelve judges, with no increases, even though their caseload was about two-thirds of ours. That was a very poor arrangement, and we thought that the commission should study all of the circuits throughout the country. Actually, at one stage, I gave a speech to the American Law Institute, talking about that, but we'll talk about that later. What happened then, was that the House did pass such a commission. The proposed composition of the commission, as recommended by Senator Feinstein, was three from the House, three from the Senate, three from the President, and three the Judiciary. The final approved composition of the commission was there would be five members, and they would all be appointed by the Chief Justice of the U.S. Supreme Court. He appointed Justice [Byron] White, as the chairman, and four others, and they were to study all of the circuits, with particular attention to the Ninth Circuit. That's what they did. They went around the country and held hearings in all the various places. It was really significant to me that when they held a hearing in Seattle, where all of the impetuous for splitting the circuit took place; there were only five persons who testified to split it, and twenty persons who testified not to split it.

Well, that's interesting.

Then the second hearing in our circuit was held in San Francisco, and there were thirty-seven persons who testified, only one person testified to split the circuit, and thirty-six testified not to split it. I thought that was a significant thing because here was a time that the White Commission was really trying to determine what the circuits wanted, what the approach was, whether they felt the circuit was working well or not, and to have that kind of a representation that we, in the Ninth Circuit, were very happy with the way the circuit was working, and leave us alone. [laughter]

I guess there were some judges on the court of appeals who were in favor of a split.

Yes, there were.

But they were outnumbered by those who wanted to maintain the status quo.

Well, only Judge Sneed spoke at the hearing in San Francisco. Maybe a better way to look at it is that when we voted as a court whether we wanted to split or not, there were only five active judges who wanted to split–they were from the north–and Judge Sneed. I think there were four out of the twenty senior judges who thought that we should split the circuit, but the rest of the judges overwhelmingly voted not to split the circuit.

Ostensibly one of the reasons for changing the configurations of the circuits is the conflict of laws between circuits, obviously those cases have to usually end up before the Supreme Court, and some have advocated that rather than increasing the number of circuits, what the judiciary really needs to do is to reduce the number of circuits, make larger circuits, as opposed to having more circuits. Would you care to comment on that proposal?

Yes. I think Judge Wallace wrote a law review article about that proposal. I think that makes a lot of sense. The fact is that it is politically not feasible, I don't think, because the circuits in the east that are small would strongly resist being combined. It would make a lot of sense, and I thought maybe that would be something the White Commission might recommend, but I think they decided not to get into that aspect.

What ultimately did the White Commission recommend with respect to the Ninth Circuit?

They recommended that the circuit not be split. They said that there were about eight to ten different configurations that they had looked at and none of them worked well. They did make a proposal for how the Ninth Circuit could operate keeping together that was, in my opinion, completely infeasible. I wrote a position paper for our court as to why; later that was picked up in some law review articles too. But it actually made this a lot easier to defeat in Congress because the system was so infeasible. I thought it was an academic approach, without working out the details as to why it wouldn't work, by Professor [Daniel] Meador, who turned out to be the director and was a law professor from the University of Virginia. It seemed to me that it was his academic idea that this would be a neat way to do things. We did go back to Congress and testify as to why it was infeasible.

How was that received?

It was received well, and some members of the bar came out and testified too. Senator Reid and Senator [Richard] Bryan were both opposed to it. I think that proposal by the White Commission was not seriously considered.

16

Judicial Philosophy and Challenges for the Judiciary

I'd like to take a bit of a larger view now and ask you a little bit about judicial philosophy. Do you feel that your judicial philosophy has changed over time? And if so, how? Or did you come to the court with a set of beliefs and ideas and you pretty much stuck by them?

I don't think my philosophy really has changed much. Maybe in some specific things that, as I learned more that, I can think of one, and I'll mention it in a minute but generally, I don't think it's changed. I do think that people probably had me pegged right when they write that I'm more of a centrist, because I don't really think I have either a liberal or a conservative agenda. I certainly try to look carefully at the cases. I suppose maybe I may be a bit more sympathetic to individuals than maybe some other judges. I am inclined to try to look at what happened to the individual and how that person got there, and I am conscious of individual rights. I've always been that way and I've always tried to judge people, looking at it from their perspective. You probably saw a little of that when I was explaining about Judge Aguilar. That's kind of the way I am. I am inclined to do that.

Right. That was very interesting. The way you were revealed, going back over the circumstances and taking a lot of different factors into reconstructing the events that led to the situation.

The one area that I, when I came to the court, was not much in favor of was the exclusionary rule, where evidence is suppressed because the police have made a mistake, and I now have come to the belief that that's a good rule. You know, you look at it, on the one hand, from the standpoint that "the guilty man goes free because the constable erred" approach but, on the other hand, that's really been the only effective way to encourage correct police conduct, and it has been very effective. I just noticed from the time I used to try criminal cases to now that it's changed police administration a lot, because if an officer blows a case by going out and conducting an unauthorized search

or questioning somebody before giving a *Miranda* warning, the police administration and the district attorney and everybody comes down on him saying, "Oh my gosh, you're fouling up the case." So it's really changed the approach in management of law enforcement officials to be conscious of individual rights. I'm not confident that any other basis, lawsuits and so forth, would really do it because what happens to the person who has been wrongfully stopped or wrongfully searched or wrongfully arrested, usually they're so glad to get out of it all that they're not going to file a suit. Periodically people will, but it has to be fairly egregious before somebody's going to do it. If police go storming into somebody's house and they don't find anything, people are real mad, but they're not going to do that much about it; whereas, if they do that and just completely blow a criminal case, their superiors are going to be right on their case.

But some people think that we've gone too far in that direction.

I know. I don't think there are that many cases where a case is dismissed because of that. It's pretty rare, really.

Are there other elements of your thinking about the law that you see as having evolved?

Well, I was never very conscious of immigration law in practice. I really didn't ever do any of it. And when I came on the court, we had a lot of cases that involved immigration law, and it was interesting to me the way those cases were developing. I suppose that might be an area in which my looking at the individual's position would be somewhat different than other judges, not necessarily that my way is wrong or right. For example, one of the earliest cases that I had was *Urbano de Malaluan* [*v. Immigration and Naturalization Service*]. This was a person who had overstayed her visa and, thus, her stay was illegal. She'd gone through a deportation hearing, and they ordered her to be deported, but they never got around to deporting her. And so she stayed on for about, I think it was eight years. She was a secretary, I think a legal secretary, but a secretary in some capacity and had been a productive member of society. She had two children and was married to another alien who was lawfully here. Someway in the records, they found her and brought her up to now deport her. There was a provision in the statutes, which if you had been here seven years and had been of good moral character and to deport you would be an extreme hardship, then there is the discretion to be able to waive the deportation.

So I remember I was on this case with Judge [Anthony] Kennedy, now Justice Kennedy, and a district judge from Montana, Judge William J. Jameson, who had been president of the ABA, a real fine man. It was a very close case, but I just felt that if there were ever a situation in which this provision in the statute should be applied, this was it. She had one child that was nearly school-aged and the other was going to school. They only spoke English and looking from the standpoint of the children, as well as from her standpoint, but it seemed to me that was an ideal situation to apply the waiver. Here was a productive person—employed—it was going to break up the family, and children who only spoke English. It was going to be extremely disruptive and this would be the kind of person we'd want to keep here. Judge Kennedy more literally applied the law and thought that we had to give the deference to the determination of the Board of Immigration Appeals, to which we were

supposed to defer, and that however we might feel about it, we didn't have the authority to overrule them. It was a close question. This was within the first year or two that I was on the court, and we only had thirteen members. Judge Kennedy had asked for *en banc* consideration, and we had our court meeting and right afterwards, instead of voting by email, as we do now, right after the court meeting, we then said, well, now this is a good time to consider whether we're going to take this case *en banc*.

Judge Kennedy and I each gave our little oral arguments as to why we thought it should or shouldn't be taken and then went around the table voting on it. And I remember Judge [Ozell] Trask, who I knew was in favor of my point of view, was confused as to what a yes or a no meant because I could tell that. As it was going around, he had voted the other way, and I went over and whispered in his ear. [laughter]. So he changed his vote, and I think it was seven-to-six not to take the case *en banc*. It was interesting thinking back on that, it was kind of a funny situation, but it was a very close case. I've often wondered what ever happened to her. I never knew.

Yes, it's curious, isn't it? Well, that sort of leads to another question more generally about your attitude toward judicial activism. I know that, I've read a speech I think you gave at a judicial college many years ago about the living constitution and your attitude about the constitution as a document that had evolved over time. It's not something that was intended to be confined strictly to the text crafted 200 years ago.

That's right.

So what's your attitude toward judicial activism?

Well, you know, it's funny what a person thinks of as judicial activism. I think it is in the eye of the beholder. There's activism both from the standpoint of judges who are more liberal and judges who are more conservative. You read about that all the time. You know, the Warren Court was an activist court, and now people are saying the Rehnquist Court is an activist court the other way. The way I view it is that I think that the Constitution does have to be construed as a living document. There is no way that the conditions of our country now could be governed by sterile legal language that was thought of two hundred years ago. The genius of the Constitution is the fact that it was phrased broadly, not with minute specifics, but phrased broadly so that it can be interpreted in light of current circumstances, and the word, that I think is the key word you mentioned is "evolving."

We look at it in the context of a world that now has computers, airplanes, telephones, and television, as opposed to the world that was known then, horse and buggy, no railroads, no cars, no airplanes, and a much smaller country. I mean no one really, without some extraordinary vision, could have ever thought that we would have this whole continent from coast to coast. And society is so much different than it was then, so that I think the real secret of our continuance under the Constitution is the fact that it can be interpreted in that way without having to be amended specifically every time there is a change within the country. And it does provide a real bedrock of guiding principles for us but that gradually those are developed just as we did with civil rights, in *Brown v. Board of Education*. When the Constitution was initially enacted it was thought that the slaves weren't really to be considered persons and women couldn't vote. All those things have changed, and I think our Constitution

is much sounder to be interpreted in light of those circumstances, but the word is correct when you use it and that's "evolve."

Well, certainly the courts have changed over time, too.

Yes.

And today, I guess there are more and more challenges that are facing the courts. What do you see as some of the challenges facing the judicial system today?

Well, the more immediate challenge that's facing the federal courts right now, and I'm hoping it's a temporary one, and that is the reluctance to provide the number of judges that are needed to do the job right. And partly this is due, in my view, to the members of our appellate courts themselves, because of the resistance to growth. There's the thought of capping the federal judiciary at a thousand in order to encourage Congress not to pass additional laws that are an addition to our jurisdiction. Well, I think that's very naive. Because there's no way that Congress can or should determine what is necessary for the conduct of the country by the desire of some judges to remain a small court or a small federal judiciary. I think it's very important that we have the adequate federal judges that are necessary to do the job that Congress has assigned to us.

I've just recently given some speeches about this. I'm very concerned. The difficulty with determining whether a circuit should be split or how big it should get is all wrapped up in the question of how we organize this intermediate court system, the courts of appeals. Since 1960, the district courts generally have been accorded the number of judges necessary. There has been a thirty-five percent increase over that time which is modest; the caseload per district judge has increased thirty-five percent. During this same time, the caseload per judge in the appellate courts has increased 347 percent. The only way that we can continue to manage the case load, without increasing the number of judges, would be to have greater delegation to staff or more cursory review by the judges, neither of which is desirable. Or the third alternative is to keep accepting more and more cases and just figure some way it will take care of itself. But it can't. We have to decide whether we're going to have more circuits or larger circuits or the third alternative keep accepting cases, but that just can't be a reasonable solution.

That's kind of the quagmire that we're in, and I'm sure we're going to think our way out of it as a country, we always have, but right now that's a real threat to the continued excellence of the federal judiciary. In the Ninth Circuit, we feel that a large circuit has worked and will work very well with our twenty-eight active judges. We think it can work well with thirty-eight active judges. Maybe at some time we'll determine that it's not effective to add more circuit judges and then we'll split, like the Fifth Circuit decided when it got to a certain stage. It split at an earlier stage.

There are some circuits in the country, the Eleventh being one; they'll accept any number of cases because they don't want to get any larger than twelve. And so they have this enormous caseload and that just can't be good for the continued operation of the federal courts. I think that ours was sort of an experiment as to see how a large court can work. We've made it work well, and we just have to continue monitoring it. If, at some

stage, it doesn't work well and the judges and the lawyers are not happy with the way it's going, then we'll do something about it and possibly divide it.

Well, what has contributed to this enormous increase in caseload for the courts of appeals?

As the country's population grew and as more and more district judges were added and more and more case load in the lower courts were added, the failure to add correspondingly the circuit judges that are necessary to handle that.

So the total number of appeals judges, appellate judges has remained relatively stable?

Yes.

As opposed to the districts?

Right.

I see. I suppose too that there's been an increase in the federalization of certain crimes.

Indeed. That has contributed to it—the federalization of crimes and the civil rights statutes, employment discrimination, disability laws, and prisoner appeals.

Right, and we've talked about that, the pro se cases and the effect that that's had.

In fairness, I would have to say that part of that increase has been a considerable number of cases that are fairly frivolous or non-meritorious. So that the full amount of that would not have to be rectified but a good deal of it would.

What would you say is the extent of the Ninth Circuit's influence on public policy?

Pretty substantial.

In what ways?

Well, the Ninth Circuit has been kind of on the cutting edge of a lot of areas in law—partly because it has a considerably diversified population with different problems that arise that a lot of key cases have been brought up in the Ninth Circuit, in which we've had to rule, and I suspect maybe the lawyers are more willing to bring up unusual cases.

And why do you think they're more willing to bring unusual cases here?

I think, generally, westerners are inclined not to be as much bound by tradition and that the western culture is a little bit more free-spirited. One of the other areas of course that the Ninth Circuit has been very influential in because of its geography is environmental law.

17

Concluding Thoughts

Are there other things you'd like to tell us about your life or about your tenure on the bench that I have haven't thought to ask you?

Well, I guess, right now, one of the major concerns I have as chief judge is developing what we're going to be doing for the next year or so when we have somewhere between six and nine vacancies on our court and no new judges under a new judgeship bill that we've requested, so that we have a lot larger case load than we really should have to handle, and what we're going to do about that? And I've set up a committee now to develop alternatives that we'll be considering as to what we should do. I mean conceivably we can let the backlog build and say, "It's Congress's problem," or we can make some herculean efforts to develop new ways of doing things that would be temporary.

What I'd like to see, frankly, is to say we should make every effort we can to keep up with our caseload, but we should make it known to the public and to the bar that we're doing some certain things, emergency measures, not that we want to continue it in this way, not so that Congress can say, "You've done it in the past, now you can keep doing it." But things like judgment orders and restricting oral argument or restricting the number of opinions that we write, that we would do, with the idea that this is not the way we should be continuing to do it, but we owe an obligation to the parties to get a decision. Now a lot of members on the court feel very differently about it. We have as many opinions as we have judges, I suppose, as to how we should do this, but that's what we're going to try to develop, by looking at all the various alternatives, what can we do in a more efficient manner—in our fast-track screening programs, what can we do in this way or other. But always the concern in the background is that, you know, if we do this, we don't want Congress to think, ah hah, you can handle a much greater caseload, because in doing that we're not doing as effective or thorough a job as we should.

I guess one thing just from a standpoint of personal pride, I was just figuring up the

thing, the ones that have gone to the Supreme Court, I think I've had fifteen cases that have gone there, and I have ten affirmances, three reversals, and two where they were reversed one part and affirmed the other.

That's a very impressive record.

Yes, pretty good. One of the other things I was thinking the other day that I have only had two cases that I've written the panel opinion on that have been taken *en banc* and in both of them the *en banc* court went the way I did on the panel.

That's even more impressive because these are your colleagues.

[laughter] I don't know, but anyway that's the record, I don't say that to anybody but you—but put that in my record somewhere, tuck it away, because I felt good about it.

We definitely will. Anything else?

Well, let me think. I can't really think of anything offhand, other than that I've certainly enjoyed my time on the bench. I mean, I enjoyed practicing law enormously. I really had a lot of fun doing it, and I felt good about it but I've enjoyed the bench so much. I enjoy the people on the bench. There, I would have to say that I think that the personnel that are in the federal courts and our circuit, both our courts of appeal and the district judges, really are extremely competent people. I just have enormous respect for all of them. The district judges are exceptionally fine trial judges. Where you see it the most on our circuit court of appeals is in the *en banc* cases because we'll sit around, they'll be eleven of us sitting around a table and it's very rare indeed that I'll go to an *en banc* case, having studied very thoroughly, that I won't hear some very significant new approaches from some judges who have seen it in just a little different way that really makes sense. I'm impressed with how thorough all the judges really look into the cases and really think about it. It's kind of a matter of pride, I guess, with all of us. When we see everyone else is doing that thorough of a job, we're not going to slack up either. There really has never been an organization that I've been that impressed with, just the complete thoroughness of the way they approach their jobs.

Is there anything you want to add to our conversation—questions I haven't asked you about—is there anything that you wanted to tell me about in your tenure as chief judge that I hadn't asked you about?

Yes. I would like to tell you about the importance of my family to me. My family has been very important to me during my entire career as a lawyer and a judge, and I am very proud of them. Barbara did a great job in raising our three children, and when they were older she had a successful career of her own. She was vice-president of Nevada Telephone and Telegraph Company for ten years and was on the board of directors of the First National Bank of Nevada and of St. Mary's Hospital. She received a Distinguished Nevadan Award from the University of Nevada. She was particularly helpful to me when I was chief judge in managing all of the spouses' events at our conferences. That contributed a lot to the collegiality of the judges.

I am also proud of our three children. Our daughter, Cheryl, is a medical doctor and is currently in charge of the Student Health

Services at the University of Nevada, Reno. Our son, Procter, is a practicing attorney in Reno, and is highly regarded by his clients and by other attorneys. My daughter, Elyse, was a very popular and excellent fifth grade teacher. She left teaching to raise her three daughters. I am also proud of our eight grandchildren, who are all doing well. One of the things I am most pleased about is that all of our children and grandchildren get along very well together and are supportive of each other.